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Wisconsin. Supreme Court

WISCONSIN REPORTS

176

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JANUARY 10—APRIL 11, 1922

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OF THE

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After February 11, 1922

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(Appointed April 4, 1922)

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MEMORANDUM.

Mr. Chief Justice SIEBECKER took no part in the decision of the cases reported in this volume except those appearing on pages 107–153, 289–313, and 521–537.

ERRATA.

VOL. 169.

Page 545, line 24. For defendant, read plaintiff.

VOL. 175.

Page 377, line 9 from bottom. For conceded, read contended.

TABLE

OF

CASES REPORTED.

American Cartage Co., Chase v. 235
American Express Co., Slivick v. 314
Anderson, In re: Anderson v. Rockdale School Dist. 459

Insane persons: Sale of lands: Offer at fair value: Higher offer with ulterior purpose.

Anderson v. Miller Scrap Iron Co. 521

Workmen's compensation: Place of accident: What law governs: Payment of compensation to widow as assignment of claim against third person: Action by administrator: Cause of action created by laws of sister state.

Andrae Electrical Co. v. Courteen 92
Application of Gehrke: Wis. River P. Co., Appellant 452
Archambault, Ballard v. 217
Atchison, Topeka & Santa Fe R. Co., Gauthier v. 245
Austin, Estate of 265

Executors and administrators: Claims against estate: Services gratuitously rendered: Trustee handling property as his own: Compensation.

Automobile Liability Co., McCaffery v. 230

Badger Public Service Co., Stark v. 600
Ballard v. Archambault 217

Brokers: Non-exclusive contract of employment: Right of owner to sell.

Bartel Co., Knobel v. 393
Bast v. Sproll 371

Contracts: Definiteness: Presumption as to rate of interest: As to time of payment: Uncertainty as to time of payment: Enforceability of contract.

Becker v. Green County 120

Officers: Ouster by conviction of infamous crime: Recovery of salary on reversal of judgment: Statutes: Revision: Consolidation: Statute enacted after conviction: Questions not litigated: Waiver.

Bielefeld, Lee v. 225

Board of Trustees of Racine College, Ward v. 168

Brickell v. Trecker 557

Automobiles: Injuries to pedestrians: Negligence: Pedestrian and driver each failing to see the other: Liability.

Briggs v. Miller 321

Contracts: Elements: Consideration: Unilateral contracts: Promise to indemnify past losses.

Brockman v. Werner 517

Contracts: Cost-plus agreements: Modification to include other work: Evidence: Sufficiency.

Brown v. Marty 456

Brokers: Commission dependent on payment of purchase price: Evidence: Sufficiency: Voluntary abandonment of sale.

Brust v. First National Bank of Stevens Point 14

Venue: Ruling on change of venue not appealable: Civil court of Milwaukee county: New trial after venue changed.

Burnham Bros. Brick Co., Stark v. 331

Caddo-Texas Oil Lands Co., Nelson v. 327

Carlson, In re 539

Criminal law: Murder: Aiders and abettors: Indictment or information: Certainty: Sufficiency: Necessity of words "malice aforethought" or equivalent: Jurisdiction of court if no crime stated: Plea of guilty to information not charging murder: Validity of sentence: Review: *Habeas corpus* not remedy: Procedure upon plea of guilty.

Catfish River Drainage District, In re 607

Drainage districts: Creation: Proceedings: Nature: Lands described in petition but not shown on map: Supplemental

petitions: Good faith: Lands benefited in part: Interest of executory vendor and vendee: Interest of life tenant: Computation.

Chapin, Tegen v. 410

Chase v. American Cartage Co. 235

Courts: Decision of court of last resort: *Obiter:* Judicial *dictum:* Decision of germane questions: Law of the case: Appeal: Change in judicial rule: Effect on pending cases: Automobiles: Imputed negligence.

Chicago & Milwaukee E. R. Co., Kausch v. 21

Chicago, Milwaukee & St. Paul R. Co., Herschman v. .. 209

Chicago, Milwaukee & St. Paul R. Co., Richter v. 188

Chicago, Milwaukee & St. Paul R. Co., Westgard v. .. 636

Circuit Court, State ex rel. Wisconsin Dry Milk Co. v. .. 198

Clemens v. State 289

Criminal law: Homicide: Credibility of witnesses: Question for jury: Negligence: Manslaughter: Culpable negligence: Violation of automobile statutes: Conviction based on improper statute: Trial: Verdict received in absence of defendant and counsel.

Corscot v. State 103

Criminal law: Summary exceptions: Scope of review: Questions challenging the sufficiency of the evidence.

Courteen, Herman Andrae Electrical Co. v. 92

Cream City Cartage Co., Fernhaber v. 75

Dekowski v. Stachura 154

Specific performance: Liquidated damages: Contract to convey or pay damages: How enforced.

Diefenbach v. Jarett 70

Insurance: Agreements to divide commissions: Validity: Money had and received.

Dixon, McFarlane v. 652

Drew, Neacy v. 348

Duras v. Keller 88

Judgment: Entry dismissing action: Vacation upon failure of party to comply with settlement: Judgment by consent: Nature.

Ehlers v. Gold 336
Pleading: Amendment: Discretion of court.

Fernhaber v. Cream City Cartage Co. 75
Fraudulent conveyances: Proof required: Transactions with relatives: Evidence: Bankruptcy: Action by trustee: Necessity of showing insufficiency of assets: Waiver.

Finsky v. State 481
Intoxicating liquors: Dealers in nonintoxicating beverages: Unlawful liquor upon premises: Title: Use in evidence: Information: Stating crime in words of statute: Judicial notice: Acts of Congress: Search of dealer's premises: Warrant: Permission: Instructions: Harmless error.

Firemen's Pension Fund, State ex rel. Houlahan v. 31
First National Bank of Stevens Point, Brust v. 14
First National Exchange Bank v. Harvey 64
Judgment: Equitable relief to restrain enforcement: Laches.

Fowle, Kuglich v. 60
Fuller & Johnson Mfg. Co., City of Madison v. 462
F. W. Woolworth Co. v. Vogelsang 366
Easements: Description in grant: Definiteness: Practical construction: Use of servient estate: Appeal: Rules for future guidance of parties.

Gauthier v. Atchison, Topeka & Santa Fe R. Co. 245
Federal employers' liability: Limitation of actions: Estoppel: Fraud.

Gehrke, Application of: Wis. River P. Co., Appellant 452
Eminent domain: Damage to landowner by construction of dam: Alternative causes of damage: Excessive rainfall: Disposition of case.

Genske v. Veith 390
Highways: Deviations between proposed and actual course: Changes in route at request of landowner: Estoppel.

Gold, Ehlers v. 336
Greenberg v. Perlson 84
Sales: Goods not conforming to contract: Rejection by buyer: Disposition: Option of buyer: Reasonable market value.

Green County, Becker v. 120
Griffin v. Milwaukee E. R. & L. Co. 179
Appeal and error: Affirmance by divided court.

Guenther v. Rutkowski 180
Drains: Assessment of benefits: Failure to award damages: Jurisdiction of supervisors: Appeal from void order: Waiver of jurisdictional defect: Laches: Equitable relief.

Haffner v. State 471
Keeping house of ill fame: Evidence: Sufficiency: Question for jury: Presumption: Coercion of wife by husband: Comment by counsel upon defendant's failure to testify: Discretion of court as to argument: Proof of sale of liquor in house: Knowledge of defendant: Necessity of actual knowledge: Circumstantial evidence: Harmless error.

Hanley v. Hines 252
Compromise and settlement: Presumption: Burden of proof: Sufficiency of evidence.

Hanreddy, Estate of ..... ~~568~~ 570
Executors and administrators: Claims against decedents: Ancillary and domiciliary administration: Assets wherever situate liable for claims: Nonresident creditors.

Harvey, First National Exchange Bank v. 64
Heal v. Stoll 137
Fraud: Misrepresentations as to value of second mortgage: Complaint: Statement of fact or opinion: Sufficiency of evidence: Belief of purchaser that he is dealing with principal: Liability of principal for fraud of agent: Damages: Value of lands: Evidence.

Heintz v. Schenck 562
Automobiles: Right of way at intersecting streets: Boulevards divided by parkway: Trial: Remarks of counsel: Qualifications of juror: View of premises: Non-prejudicial error: Excessive damages.

Helios, Regas v. 56
Herman Andrae Electrical Co. v. Courteen 92
Arbitration and award: Functions of arbitrators: When powers cease: Mistake: Effect on determination of controversy.

Hermansen v. Slatter 426

Specific performance: Contract to convey land: Time as essence: Intention of parties: Conduct: Waiver of non-performance: Estoppel: Findings of court.

Herschman v. Chicago, Milwaukee & St. Paul R. Co. .. 209

Railroads: Employees' passes: Refusal of conductor to honor: Remedies of employee: Attempt to continue journey: Death of employee: Evidence.

Hind v. Thomas 379

Sales: Warranties: Nondisclosure of latent defect: Question for jury: Reliance upon representations: Evidence: Value of horse if sound: Appeal: Objections to form of special verdict.

Hines, Hanley v. 252

Holsapple v. Scofield 649

Physicians and surgeons: Compensation of dentist: Services rendered in workmanlike manner: Expert testimony.

Houlahan, State ex rel., v. Board of Trustees, etc. 31

Isgro v. Plankinton Packing Co. 507

Automobiles: Injury to laborer working in street: Negligence: Questions for jury.

Jarett, Diefenbach v. 70

J. Bartel Co., Knobel v. 393

John v. Pierce 220

Automobiles: Negligence of driver as imputed to invited guest: Former appeal: Law of the case: New trial: Discretion of court.

Johnson v. Prideaux 375

Automobiles: Law of the road: Violation: Sudden peril caused by negligence of another: Choice of action: Complete obstruction of vision: Negligence.

Johnson, State ex rel. Pluntz v. 107

Kaempfer, State ex rel. Williams v. 283

Kastner, Seemann v. 51

Kausch v. Chicago & Milwaukee E. R. Co. 21

Judgment: Oral: Appeal: Codefendants: Negligence: Reasonable anticipation: Street railways: Starting car while passenger is boarding: Brushing passenger against standing truck: Trial: Special verdict: Form: Instructions: Proximate cause: Contributory negligence.

Keller, Duras v. 88

Kessler v. Reese 386

Lost instruments: Payment: Presumption: Burden of proof.

Knobel v. J. Bartel Co. 393

Sales: Defective goods: Reasonable time for rejection: Acceptance: Retention without objection: Acts of ownership: Question for jury: Local custom.

Kornwolf v. Milwaukee E. R. & L. Co. 160

Street railways: Collision with automobile: Negligence: Care required of persons driving on tracks: Trial: Instructions.

Kroner v. Order of United Commercial Travelers 151

Appeal and error: Affirmance by divided court.

Kuglich v. Fowle 60

Hospitals: Personal injury to patient: Joint action against lessee physician and lessor hospital: Evidence as to relation of defendants: Competency: New trial.

Kuswa, Schuier v. 48

Lear, State ex rel. Plowman v. 406

Lee v. Bielefeld 225

Fraud: Misrepresentations as to boundaries of land: Liability of vendor: Measure of damages: Improvements made on land of another: Removal.

Long, Petition of: Long v. State 361

Appeal: Right to appeal: Appeals not given by statute: Compensation to innocent person imprisoned for crime: Decision of board of control: Review.

Madison, City of, v. Fuller & Johnson Mfg. Co. 462

Vacation of street: Statute limiting time to attack attempted vacation: Construction: Legislative power: Action of common council: Validating imperfect vacation.

Marling, Schumacher v. 441

Marty, Brown v. 456

McCaffery v. Automobile Liability Co. 230

Automobiles: Common carriers: Jitneys: Degree of care required toward passengers: Negligence: Right to assume others will observe law of road.

McFarlane v. Dixon 652

Vendor and purchaser: Failure of vendor's title: Specific performance: Damages: Failure of title as to part of lands: Remedies.

McGowan Water, L. & P. Co., Town of Milton v. 658

Meisser, Payne v. 432

Meyer v. State 184

Homicide: Murder in first degree: Sufficiency of evidence: Argument to jury: Prosecutor characterizing nature of crime.

Miller, Briggs v. 321

Miller Scrap Iron Co., Anderson v. 521

Milton, Town of, v. McGowan Water, L. & P. Co. 658

Public utilities: Discontinuance of proceedings to acquire utility: Statutory limitation on right to discontinue.

Milwaukee E. R. & L. Co., Griffin v. 179

Milwaukee E. R. & L. Co., Kornwolf v. 160

Milwaukee E. R. & L. Co., Sharp v. 340

Mulkern v. State 490

Automobiles: Criminal law: Speeding: Evidence: Statutes: Definiteness in charging crime.

Neacy v. Drew 348

Municipal corporations: Cities of the first class: Special legislation: Validation of unlawful contracts: Taxpayer's action to recover moneys paid: Laches: Performance of contract while action pending: Pleading: Demurrer.

Nelson v. Caddo-Texas Oil Lands Co. 327

Corporations: Salary of officer: Waiver: Intent: Question for jury.

Nelson v. Pauli 1

Automobiles: Pedestrian waiting for street car: Contributory negligence: Damages: Broken ankle: Gratuitous medical services: Trial: Pleadings as evidence: Argument as to effect of jury's answers: Harmless error: Special verdict: Question as to unavoidable accident.

New Holstein Canning Co., Quaker Maid Corp. v. ... 279

Northwestern Iron Co., Worthington P. & M. Corp. v. 35

Order of United Commercial Travelers, Kroner v. 151

Pauli, Nelson v. 1

Payne v. Meisser 432

Waste: Survival of action: Jurisdiction of circuit court: Necessity of present seizin by plaintiff: Claims arising in tort: Jurisdiction of county court: Parties to action.

Payne, Zarcone v. 240

Pera v. Village of Shorewood 261

Constitutional law: Filing claim under statute: Right to attack statute as invalid: Ordinance creating residential and business districts in villages: Damages to property owners.

Perlson, Greenberg v. 84

Petition of Long: Long v. State 361

Pfister & Vogel Leather Co., Waters v. 16

Pierce, John v. 220

Pionke v. Washburn 417

Boundaries: Agreement to have survey made: Effect: Assessment of damages by court and not by jury: Harmless error.

Plankinton Packing Co., Isgro v. 507

Plowman, State ex rel., v. Lear 406

Pluntz, State ex rel., v. Johnson 107

Potrykus, State ex rel., v. Schinz 646

Prideaux, Johnson v. 375

Quaker Maid Corporation v. New Holstein C. Co. 279

Sales: Refusal of seller to perform: Complaint: Modification of contract: Non-negotiable checks: Revenue stamps on checks.

Racine, City of, Sieb v. 617
Racine College, Board of Trustees of, Ward v. 168
Reese, Kessler v. 386
Reeve, Guardianship of 579

Wills: Fraud on residuary legatees: Settlement with alleged issue of intervening legatee: Cancellation on discovery of fraud: Laches: Limitation of actions: Probate courts: Control of judgments and records: Relief cognizable solely in equity: Guardian and ward: Jurisdiction of court: Fraud of heirs as affecting inheritance.

Regas v. Helios 56

Principal and agent: Agent intrusted with money: Commission: Good faith.

Richter v. Chicago, Milwaukee & St. Paul R. Co. 188

Federal employers' liability: Car repairer returning from interstate employment: Contributory negligence: Boarding moving train: Proximate cause: Reasonable anticipation.

Rockdale School District, Anderson v. 459
Rock Falls Mfg. Co., Tetley, Sletten & Dahl v. 400
Rutkowski, Guenther v. 180

Schenck, Heintz v. 562
Schinz, State ex rel. Potrykus v. 646
Schuier v. Kuswa 48

Execution against the body: Payment of board: Jail limits: Bond.

Schumacher v. Marling 441
Scofield, Holsapple v. 649
Sederlund v. Sederlund 627

Deeds: Conveyance by parent to child: Fraud on wife subsequently married: Descent and distribution: Transfers by husband to avoid wife's rights.

Seemann v. Kastner 51

New trial: Newly-discovered evidence: Cumulative evidence: Due diligence in preparing for trial.

Sharp v. Milwaukee E. R. & L. Co. 340

Railroads: Automobile stalled on grade crossing: Negligence: Special verdict: Inconsistency: Inadequate damages.

Shorewood, Village of, Pera v. 261

Sieb v. City of Racine 617

Schools: Superintendent of city schools: General charter law: Special statute: Whether officer or employee: Increase of salary during term: Trial: Affidavit of prejudice: Filed after term commences: Appeal: Equal division of appellate court.

Slatter, Hermansen v. 426

Slivick v. American Express Co. 314

Contracts: Agreement to transmit money: Breach: Receipt of express company: Parol testimony to explain.

Smith, Will of 494

Wills: Construction: After-acquired real estate: Property in expectancy: Absolute gifts or life estates: Right to use principal: Appointment of trustee: Perpetuities: Estate substantially personal property: Conversion of real estate.

Sproll, Bast v. 371

Stachura, Dekowski v. 154

Stark v. Badger Public Service Co. 600

Electricity: Death: Negligence: *Res ipsa loquitur.*

Stark v. Burnham Bros. Brick Co. 331

Sales: Written acknowledgment of oral order: Where goods are to be used: Rights of parties: Cash sales: Measure of damages upon nondelivery.

State, Clemens v. 289

State, Corscot v. 103

State, Finsky v. 481

State, Haffner v. 471

State, Long v. 361

State, Meyer v. 184

State, Mulkern v. 490

State ex rel. Houlahan v. Board of Trustees, etc. 31

Municipal corporations: Pension funds for firemen: "Dependent daughter."

State ex rel. Plowman v. Lear 406

Highways: Laying out highways: Award of damages by assessment or agreement: Appeal: Statutes *in pari materia:* Construction.

State ex rel. Pluntz v. Johnson 107

Sheriffs: Hold-over officers: Eligibility for succeeding term: Appointive and elective sheriffs: Term: Constitutional law.

State ex rel. Potrykus v. Schinz 646

New trial: Motion not decided within sixty days: Oral continuance of hearing by court: Request of party: Cases where special verdict is rendered: New trial on newly-discovered evidence.

State ex rel. Time Ins. Co. v. Superior Court 269

Insurance: Action against company: Wrongful discharge of agent: Venue: Statutes: Amendments: Construction: Repeal and re-enactment of statutes.

State ex rel. Williams v. Kaempfer 283

Municipal corporations: Cities of the first class: Election of city attorney: Constitutional law: Special legislation: Laws embracing more than one subject: Regular municipal elections: Pleading: Demurrer to answer: Sufficiency of complaint.

State ex rel. Wisconsin Dry Milk Co. v. Circuit Court 198

Corporations: Venue of action against foreign corporation: Accounting: Liquidation: Principal place of business: Visitorial powers over foreign corporations: Sufficiency of demand to change venue: Statutes: Construction: "Or" and "and."

Stoll, Heal v. 137

Superior, City of, Superior Water, L. & P. Co. v. 626

Superior Court, State ex rel. Time Ins. Co. v. 269

Superior Water, L. & P. Co. v. Superior 626

Appeal: Demurrer: Leave to plead over: Judgment on failure to plead.

Tegen v. Chapin 410

Sales: Breach of warranty: Representation that a cow is a breeder: Failure to produce mature calf: Opinion evidence: Weight: Limits: Duty of buyer to give notice: Reasonable time.

Tetley, Sletten & Dahl v. Rock Falls Mfg. Co 400

Corporations: Service on foreign corporations: Service on agent engaged in interstate commerce: Continuous course of business in state.

Thomas, Hind v. 379

Throne v. Wandell 97

Assault and battery: Surgical operation without patient's consent: Sufficiency of evidence: Damages.

Time Ins. Co., State ex rel., v. Superior Court 269

Trecker, Brickell v. 557

Twohig v. Twohig 275

Divorce: Division of estate: Allowance to wife: Custody of children: Appointment of trustee for wife: Discretion of court.

United Commercial Travelers of America, Kroner v. ... 151

Veith, Genske v. 390

Vogelsang, F. W. Woolworth Co. v. 366

Wandell, Throne v. 97

Ward v. Board of Trustees of Racine College 168

Bill of exceptions: Extension of time for settlement: Adequate excuse: Discretion of court: Affidavits of persons having personal knowledge of facts: Fraudulent representations inducing contract: Failure of consideration.

Washburn, Pionke v. 417

Waters v. Pfister & Vogel Leather Co. 16

Carriers: Ocean and land carriers: Joint rates: Validity: Undercharges: Liability of consignee for lawful rate.

Weinzirl v. Weinzirl 420

Specific performance: Evidence sufficient to establish contract: Joinder of actions: Specific performance by heir and conversion by administrator.

Werner, Brockman v. 517
Westgard v. Chicago, Milwaukee & St. Paul R. Co.... 636
Federal employers' liability: Duty of master to use safe appliances: Burden of showing proximate cause.

Whalen, Plaintiff: Schumacher v. Marling 441
Subrogation: Mortgage paid by money fraudulently borrowed: Rights of lender: Constructive trusts.

Williams, State ex rel., v. Kaempfer 283
Wisconsin Dry Milk Co., State ex rel., v. Circuit Court 198
Woolworth Co. v. Vogelsang 366
Worthington Pump & M. Corp. v. Northwestern I. Co. 35
Inspection of instruments: Materiality of writings sought to be inspected: Control of adverse party: Showing of materiality.

Zarcone v. Payne 240
Federal employers' liability: Negligence of fellow-servant: Assumption of risk: Knowledge of negligence of co-employee: Question for jury.

CITATIONS BY THE COURT.

CASES CITED.

Abrams v. Seattle 60 Wash. 356 - - - - - - 606
Acer v. Hotchkiss 97 N. Y. 395 - - - - - - 448
Adams v. Adams 55 N. J. Eq. 42 - - - - - 373
—— v. State 65 Ind. 565 - 549
Ætna L. Ins. Co. v. Middleport 124 U. S. 534 - - 448
Alabama City G. & A. R. Co. v. Appleton 171 Ala. 324 - 606
Aldrich, *In re*, 114 W. 308 - 365
Alemian v. American Exp. Co. 237 Mass. 580 - - 319
Alexander v. M., St. P. & S. S. M. R. Co. 156 W. 477 - - - - - - 641
Allen v. Boomer 82 W. 364 502
—— v. State 85 W. 22 - - 544
American R. Co. v. Coronas 230 Fed. 545 - - - 248
Anderson v. Arpin H. L. Co. 131 W. 34 - - - - - 208
—— v. Huebel 133 W. 542 - 419
—— v. Miller Scrap Iron Co. 169 W. 106 - 523, 529, 535, 536
—— v. Walter 34 Mich. 113 82
Archer v. Meadows 33 W. 166 - - - - - - 591
Arentsen v. Moreland 122 W. 167 - - - - - 657
Armour P. Co. v. U. S. 209 U. S. 56 - - - - - 18
Arnold v. Schmidt 155 W. 55 554
Astin v. C., M. & St. P. R. Co. 143 W. 477 - - 28, 299
Atkinson v. C. & N. W. R. Co. 119 W. 176 - 641, 642
Atlantic C. L. R. R. v. Burnette 239 U. S. 199 - 248
Att'y Gen. *ex rel.* Schantz v. Brunst 3 W. 787 - 113, 116

Badger v. Janesville Cotton Mills 95 W. 599 - - - 216
Bailey v. McCormick 132 W. 498 - - - - - - 647
Bain, *Ex parte*, 121 U. S. 1 546-7
Bain v. N. P. R. Co. 120 W. 412 - - - - - 531, 534
Baker v. State 69 W. 32 - 478
Bakula v. Schwab 167 W. 546 25
Ball v. U. S. 140 U. S. 118 - 556
Baltimore & O. R. Co. v. Wilson 242 U. S. 295 - - 642
Bandlow v. Thieme 53 W. 57 440
Barlass v. Barlass 143 W. 497 - - - - - 577, 593
Barlow v. Foster 149 W. 613 517
Bartz v. Paff 95 W. 95 - - 374
Bassett v. M. N. R. Co. 169 W. 152 - - - - - 163
Baxter v. C. & N. W. R. Co. 104 W. 307 - - - 415
Bayne v. Morris 1 Wall. 97 - 96
Becker v. Chester 115 W. 90 506
—— v. Spalinger 174 W. 443 145
Bedell v. Clark 171 Mich. 486 575
Beetle v. Anderson 98 W. 5 143, 146
Behling v. Wis. B. & I. Co. 158 W. 584 - 12, 511, 517
Behnke v. Kroening 174 W. 224 - - - - - - 174
Benesch v. Pagel 171 W. 620 644
Benner v. Mauer 133 W. 325 506
Benson v. Superior Mfg. Co. 147 W. 20 - - - 399, 414
Bent v. Barnes 90 W. 631 - 448
Bergen v. Urbahn 83 N. Y. 49 - - - - - - 388
Berger v. Discher 146 W. 170 - - - - - - 182
Bertrong v. State 2 Tex. App. 160 - - - - - 307
Bessey v. M., St. P. & S. S. M. R. Co. 154 W. 334 257, 259
Beyer v. St. Paul F. & M. Ins. Co. 112 W. 138 - - 216
Bingham v. Milwaukee Co. 127 W. 344 - - - 288
Bird v. Kleiner 41 W. 134 - 227
Birmingham v. State 145 W. 90 - - - - - - 296

Bjornsen v. N. P. R. Co. 84 Wash. 220 - - - - 642
Blair, *In re*, 4 W. 522 - - 551
Blake v. McClung 172 U. S. 239 - - - - - - 577
Bleiler v. Moore 88 W. 438 79
Blinn v. Nelson 222 U. S. 1 593
Bliss v. State 117 W. 596 304–5
Bloor v. Delafield 69 W. 273 28
Boldewahn v. Schmidt 89 W. 444 - - - - - - 59
Borer v. Chapman 119 U. S. 587 - - - - - - 578
Boring v. Ott 138 W. 260 - 68
Bourda v. Jones 110 W. 52 216, 415
Boyce v. Brockway 31 N. Y. 490 - - - - - - 59
Boyd v. Milwaukee 92 W. 456 - - - - - 352, 353
—— v. Mutual Fire Asso. 116 W. 155 - - - 249
Boyle v. Northwestern Nat. Bank 125 W. 498 - - 448
Bradford P. Co. v. Baal 166 W. 134 - - - 397, 416
Bradley v. Eau Claire 56 W. 168 - - - - - - 439
Brandon, Will of, 164 W. 387 - - - - - - 591
Breen v. Kennedy 158 W. 48 175
Briggs v. C. & N. W. R. Co. 125 Fed. 745 - - - 642
Brillion L. Co. v. Barnard 131 W. 284 - - - - 382
Brook v. Chappell 34 W. 405 438
Brown v. Fletcher's Estate 146 Mich. 401 - - - 579
—— v. —— 210 U. S. 82 575, 578
—— v. Ocean A. & G. Corp. 153 W. 196 - - - 250
—— v. State 137 W. 543 - 545
Brubaker v. Iowa Co. 174 W. 574 - - - - 239
Bruil v. Northwestern M. R. Asso. 72 W. 430 - - 206
Brunnell v. Hudson S. M. Co. 86 W. 587 - - - - 398
Buchner v. C., M. & N. W. R. Co. 60 W. 264 - - 237
Buck v. Pond 126 W. 382 - 374
Burghardt, Will of, 165 W. 312 - - - - - 648
Burnett v. A. C. L. R. Co. 163 N. C. 186 - - - 642
Buswell v. Order of the Iron Hall 161 Mass. 224 - 576, 577
Button v. Schroyer 5 W. 598 613

Cairns v. Chabert 3 Edw. Ch. 312 - - - - 616
Calhoun v. G. N. R. Co. 162 W. 264 - - - - 641
Canal Trustees v. Chicago 12 Ill. 403 - - - - 616
Cappon v. O'Day 165 W. 486 84
Carlill v. Carbolic S. B. Co. [1892] L. R. 2 Q. B. Div. 484 - - - - - - 325
Carpenter v. U. S. F. & G. Co. 123 W. 209 - - - 438
Castenholz v. Heller 82 W. 30 - - - - - - 227
Catlin v. Wheeler 49 W. 507 438
Cawker v. Central B. P. Co. 140 W. 25 - - - - 352
Cawley v. La Crosse City R. Co. 101 W. 145 - 163, 216
Central Vt. R. Co. v. White 238 U. S. 507 - - - 248
Cernahan v. Chrisler 107 W. 645 - - - - - - 59
Cerney v. Pawlot 66 W. 262 631
Charmley v. Charmley 125 W. 297 - - - - 449
Chase v. American C. Co. 176 W. 235 - - - 223
Chess & Wymond Co. v. La Grosse B. Co. 173 W. 382 399
Chicago & N. W. R. Co. v. Bower 241 U S. 470 - - 639
—— v. J. I. Case P. Works 173 W. 237 - - 16, 20
—— v. Railroad Comm. 167 W. 185 - - - - - 469
Childs v. Dahlke 151 W. 82 370
Chippewa B. Co. v. Durand 122 W. 85 - - - - 358
Church v. Smith 39 W. 492 614
Churchill v. Price 44 W. 540 148
Chybowski v. Bucyrus Co. 127 W. 332 - - - 565
Cica, *In re*, 18 New Mex. 452 554
Clancy v. Fire & Police Comm'rs 150 W. 630 363, 365–6
Clark v. Erie R. Co. 230 Fed. 478 - - - - - - 642
Clausen v. Fond du Lac Co. 168 W. 432 - - 123, 133
Clithero v. Fenner 122 W. 356 - - - - - - 55
Coel v. Green Bay T. Co. 147 W. 229 - - - - 26
Colle v. K., G. B. & W. R. Co. 149 W. 96 - - - 175
Collier v. Salem 146 W. 106 517
Comm. v. Chapman 11 Cush. 422 - - - - - - 544
—— v. Davis 11 Pick. 432 - 544
—— v. Webster 5 Cush. 295 544
Congar v. Chamberlain 14 W. 258 - - - - 136

Conley v. Mathieson A. Works 190 U. S. 406 - 403
Conqueror, The, 166 U. S. 110 - - - - - - 149
Consolidated W. P. Co. v. Nash 109 W. 490 - - 97
Cooper v. Jackson 4 W. 537 631
Cotter v. Plumer 72 W. 476 435
Cotton v. Sharpstein 14 W. 226 - - - - - - 59
Cotzhausen v. Dick 138 W. 127 - - - 180, 182, 183
—— v. Simon 47 W. 103 - 227
Coutant v. People 11 Wend. 511 - - - - 115, 116
Crandall, Petition of, 34 W. 177 - - - - 551, 554
Crane v. Leonard 214 Mich. 218 - - - - - - 536
Crary v. Kurtz 132 Iowa 105 83
Cunnius v. Reading School Dist. 198 U. S. 458 - - 593
Curtis v. Kimball 12 Wend. 275 - - - - - - 116

Dahinden v. Milwaukee E. R. & L. Co. 169 W. 1 163, 299
Danforth v. Oshkosh 119 W. 262 - - - - - - 506
Dardis, Will of, 135 W. 457 592
Darlington v. J. L. Gates L. Co. 151 W. 461 - - - 657
Davis v. Davis 137 W. 640 575
—— v. Isenstein 257 Ill. 260 159
Dawes v. Head 3 Pick. 128 576
Dean v. Borchsenius 30 W. 236 - - - - - - 115
—— v. Wendeberg 175 W. 513 - - - - - - 459
Deland v. Miller & Cheney Bank 119 Iowa 371 - - 83
Derr v. C., M. & St. P. R. Co. 163 W. 234 - - - 644
Dibbert v. Metropolitan Inv. Co. 158 W. 69 - - 232, 234
Dickinson v. Baltimore 48 Md. 583 - - - - - 436
Dickson v. Pritchard 111 W. 310 - - - - - - 455
Dillon v. Hunt 105 Mo. 154 13
Dinan v. Chicago & M. E. R. Co. 164 W. 295 - - - 515
Docter v. Hellberg 65 W. 415 - - - - - - 657
Doke v. James 4 N. Y. 568 96
Dolphin v. Peacock M. Co. 155 W. 435 - - - 385
Dow v. Lillie 26 N. Dak. 512 - - - - - - 576
Dowling v. Lawrence 58 W. 282 - - - - - - 382
Dreher v. Fitchburg 22 W. 675 - - - - - - 28
Drovers' Deposit Nat. Bank v. Tichenor 156 W. 251 - 324
Duel v. Bluembke 154 W. 519 - - - - - - 419
Duluth Log Co. v. Pulpwood Co. 137 Minn. 312 - - 405

Eau Claire v. Eau Claire W. Co. 137 W. 517 - - - 96
Edmundson v. Wilson 108 Ala. 118 - - - - - 96
Edwards & McCulloch L. Co. v. Mosher 88 W. 672 613–14
Ehlers v. Automobile L. Co. 169 W. 494 - - 338, 339
Ellis v. C., M. & St. P. R. Co. 120 W. 645 - - - 216
—— v. C. & N. W. R. Co. 167 W. 392 - - - 30
Elmore, Will of, 165 W. 266 501
Elsbery v. State 12 Ga. App. 86 - - - - - - 492
Emigh v. Earling 134 W. 565 448
Erie R. Co. v. Russell 183 Fed. 722 - - - - 642
—— v. Welsh 242 U. S. 303 193
—— v. Winfield 244 U. S. 170 193
Etheridge v. State 141 Ala. 29 - - - - - - 544
Evans v. Curtiss 98 W. 97 15
Ewig v. C., M. & St. P. R. Co. 167 W. 597 - - - 243

Fandek v. Barnett & Record Co. 161 W. 55 - - - 167
Farmers' Co-op. P. Co. v. Boyd 175 W. 544 - - 150
Feldschneider v. C., M. & St. P. R. Co. 122 W. 423 - - 29
Ferguson v. Mason 60 W. 377 - - - - - - 631
—— v. Truax 132 W. 478 - 232
Feyrer v. Durbrow 172 W. 71 - - - - - - 560
Fidelity & C. Co. v. Withington 229 Mass. 537 - 591
Fields v. Estate of Mundy 106 W. 383 - - - 575
Fink v. Milwaukee 17 W. 26 546
Fish v. Collins 164 W. 457 468
Fishback v. Van Dusen 33 Minn. 111 - - - - 329
Fisher, *In re*, 15 W. 511 - 591
Fitzsimmons v. Brooklyn 102 N. Y. 536 - - - 123
Flaherty v. Harrison 98 W. 559 - - - - - - 216
Flannery v. Sahagian 134 N. Y. 85 - - - - 96

Flannigan v. Stauss 131 W. 94 - - - - - - 8
Florida Cent. R. Co. v. Schuette 103 U. S. 118 - 238
Flureau v. Thornhill 2 Wm. Black. 1078 - - - 657
Folger v. Boyinton 67 W. 447 - - - - - - 9
Fond du Lac C. & B. Co. v. Henningsen P. Co. 141 W. 70 - - - - - - 402
Foote v. Foote 159 W. 179 - 506
Fort Wayne P. Co. v. Hurley-Reilly Co. 163 W. 179 397
Foster v. Taggart 54 W. 391 - - - - - - 143
Fraser v. Mulany 129 W. 377 182
Frederick v. Douglas Co. 96 W. 411 - - - 355–358
French v. State 85 W. 400 - 556
Friedrich v. Boulton 164 W. 526 - - - - - - 7
Fullerton v. Spring 3 W. 667 275

Ganzer v. Rosenfeld 153 W. 442 - - - - - - 205
Garrett v. L. & N. R. Co. 197 Fed. 715 - - - - 642
Gates v. Parmly 93 W. 294 432, 657
Gatzweiler v. Milwaukee E. R. & L. Co. 136 W. 34 - 13
Geary v. Bennett 53 W. 444 128
George v. C., M. & St. P. R. Co. 51 W. 603 - - - 249
Giffert v. West 33 W. 617 - 382
Gilkey v. Cook 60 W. 133 - 274
Gimbel v. Wehr 165 W. 1 - 370
Glatz v. Kroeger Bros. Co. 168 W. 635 - - - 233
Glentz v. State 38 W. 549 - 275
Goldey v. Morning News 156 U. S. 518 - - - - 403
Graber v. D., S. S. & A. R. Co. 159 W. 414 - - - 243
Graham, *In re*, 74 W. 450 553, 555
——, ——, 138 U. S. 461 - 554
Graves v. Portland R., L. & P. Co. 66 Oreg. 232 - - 515
Guile v. La Crosse G. & E. Co. 145 W. 157 - - - 249
Gunther v. Ullrich 82 W. 222 227

Hack v. State 141 W. 346 - 481
Hackney v. Adam 20 N. Dak. 130 - - - - - 96
Hagenah v. Milwaukee E. R. & L. Co. 136 W. 300 153, 179
Hall v. Madison 128 W. 132 237
Hamann v. Milwaukee B. Co. 127 W. 550 - - - 398
Hamilton v. Comm. 16 Pa. St. 129 - - - - - 555
Hamlen & Sons Co. v. Ill. Cent. R. Co. 212 Fed. 324 18
Hammond-Chandler L. Co. v. Industrial Comm. 163 W. 596 - - - - - 402
Hanley v. Kraftczyk 119 W. 352 - - - - - - 591
Hanna v. C., M. & St. P. R. Co. 156 W. 626 - - 15
Harker, Will of, 172 W. 99 575, 577, 578
Harrington v. Downing 166 W. 582 - - - - - 136
Haswell v. Reuter 171 W. 228 - - - - - 568, 644
Hawley v. Tesch 72 W. 299 360
Hayes, Petition of, 139 W. 163 - - - - - - 470
Hayes v. State 112 W. 304 - 550
—— v. —— 11 Ga. App. 371 492
Head v. Hargrave 105 U. S. 45 - - - - - - 149
Heinemann v. Pier 110 W. 185 - - - - - - 402
Herbst v. Hagenaers 137 N. Y. 290 - - - - - 96
Heyder v. Excelsior B. L. Asso. 42 N. J. Eq. 403 - 146
Hightower v. Georgia F. & O. Co. 145 Ga. 780 - - 96
Hill v. State 17 W. 675 - 314
—— v. Winsor 118 Mass. 251 196
Hiltgen v. Biever 162 W. 315 397
Hinds v. Doubleday 21 Wend. 223 - - - - - 116
Hinton v. Coleman 45 W. 165 - - - - - - 398
Hixon v. Oneida Co. 82 W. 515 - - - - - - 364
Hobart-Lee Tie Co. v. Keck 89 Ark. 122 - - - 55
Hoffmann v. State 65 W. 46 478
Hogan v. State 30 W. 428 544, 545, 552, 554, 556
Holland v. State 11 Ga. App. 769 - - - - - - 492
Holloway v. Durham 176 N. C. 550 - - - - - 91
Hommel v. Badger State Inv. Co. 166 W. 235 - - 8
Hooser v. Hunt 65 W. 71 - 79
Hopkins v. Langton 30 W. 379 - - - - - - 79
Horton v. Lee 106 W. 439 - 251
Hosley v. Wis. O. F. M. L. Ins. Co. 86 W. 463 - - 207
Hot Springs R. Co. v. Newman 36 Ark. 607 - - 304
Hoxie v. Price 31 W. 82 - 79

Hoyt v. American Exch. Bank 1 Duer 652 - - 46
Hrouska v. Janke 66 W. 252 385
Huber v. La Crosse City R. Co. 92 W. 636 - - - 196
Huebschmann v. McHenry 29 W. 655 - - - - 229
Hughes v. Thomas 131 W. 315 - - - - - - 449
Hume, Estate of, 179 Cal. 338 - - - - - - 591
Hurley v. Comm. of Fisheries (U. S.) 42 Sup. Ct. 83 - - - - - - 264
—— v. Texas 20 W. 634 - 275
Husbrook v. Wilder 1 Pin. 643 - - - - - - 373
Huston v. Tribbetts 171 Ill. 547 - - - - - - 616
Hyer v. Janesville 101 W. 371 - - - - - - 456
Hyland v. Roe 111 W. 361 - 449

Ill. Cent. R. Co. v. Peery 242 U. S. 292 - - - 192
Imperio v. State 153 W. 455 296
Indianapolis L. & H. Co. v. Dolby 47 Ind. App. 406 - 606
Ingersoll v. Coram 211 U. S. 335 - - - - - - 575
International H. Co. v. Kentucky 234 U. S. 579 403–405
International Textbook Co. v. Pigg 217 U. S. 91 - - 405
Irish v. Dean 39 W. 562 - 373
Israel v. Silsbee 57 W. 222 591

Jackson v. Rankin 67 W. 285 392
James v. Knox 155 W. 118 - 431
James M. Co. v. Bridge 134 W. 510 - - - - - 251
J. B. Bradford P. Co. v. Baal 166 W. 134 - - 397, 416
Jeffery v. Osborne 145 W. 351 - - - - - 224, 537
Jenkins v. Jenkins 173 W. 592 - - - - - - 278
J. H. Hamlen & Sons Co. v. Ill. Cent. R. Co. 212 Fed. 324 - - - - - - 18
J. L. Owens Co. v. Whitcomb 165 W. 92 - 397, 416
Jochumsen v. Suffolk Sav. Bank 3 Allen 87 - - 593
John v. Pierce 176 W. 220 239, 537
Johnson v. Highland 124 W. 597 - - - - - - 398
—— v. Milwaukee 88 W. 383 287, 352
—— v. People 33 Colo. 224 544
Johnson v. State 129 W. 146 304
Jones v. Caird 153 W. 384 631–2
—— v. Jones 66 W. 310 - 503
—— v. —— 223 Mass. 540 - 591
Jorgenson v. C. & N. W. R. Co. 153 W. 108 - - - 299

Kalashian v. Hines 171 W. 429 - - - - - 193, 195
Kalk v. Fielding 50 W. 339 82
Karakutza v. State 163 W. 293 - - - - - - 549
Karls v. Drake 168 W. 372 145
Kastenholz v. Heller 82 W. 30 - - - - - - 228
Katcher v. American Exp. Co. (N. J.) 109 Atl. 741 - 319
Kaufer v. Walsh 88 W. 63 79, 81
Keeley v. G. N. R. Co. 139 W. 448 - - - 129, 133
Kelley v. Madison 43 W. 638 - - - - - - 439
Kellner v. Christiansen 169 W. 390 - - - - - 13
Kelsey v. J. W. Ringrose N. Co. 152 W. 499 - - - 397
Kendall v. Orange Judd Co. 118 Minn. 1 - - 403, 405
Kenese v. Cudahy Bros. Co. 167 W. 378 - - 257, 260
Kilkelly v. State 43 W. 604 - 545
Kimball v. Adams 52 W. 554 229
—— v. Darling 32 W. 675 - 614
King v. Dixon 10 Mod. Rep. (5th ed.) 335 - - - 477
Kittner v. M. & N. R. Co. 77 W. 1 - - - - - 222
Kneeland v. Milwaukee 15 W. 454 - - - - - 239
Knox v. Knox 59 W. 172 - 502
Knudson v. George 157 W. 520 - - - - - - 227
Knutsen v. Krook 111 Minn. 352 - - - - - - 439
Koch v. Streuter 218 Ill. 546 159
Koepp v. Nat. E. & S. Co. 151 W. 302 - - - 569
Kollock v. Dodge 105 W. 187 625
Kowalkowski v. M. N. R. Co. 157 W. 473 164, 165, 167
Krakow v. Wille 125 W. 284 - - - - - - 614
Krause v. Busacker 105 W. 350 - - - - - - 227
Krueger v. Chase 172 W. 163 651
—— v. Wis. Tel. Co. 106 W. 96 - - - - - - 469
Kunza v. C. & N. W. R. Co. 140 W. 440 - - - 194
Kurath v. Gove A. Co. 144 W. 480 - - - 647, 648

Ladd v. Witte 116 W. 35 - 652
Lampe v. Kennedy 56 W. 249 - - - - - - 632
Lane v. Frawley 102 W. 373 440
Lannon v. Hackett 49 W. 261 - - - - - - 438
Larson v. McMillan 99 Wash. 626 - - - - - 589
Latimer v. Central E. Co. 101 W. 310 - - - 402
—— v. Julius Andrae & Sons Co. 101 W. 311 - - - 15
Laude v. C. & N. W. R. Co. 33 W. 640 - - - - 275
Laun v. Kipp 155 W. 347 - 68
Lauson v. Fond du Lac 141 W. 57 - - - - - 379
Laverty v. Snethen 68 N. Y. 522 - - - - - - 59
Law v. Grant 37 W. 548 - 146
Lawson v. Vernon 38 Wash. 422 - - - - - - 229
Lee v. Bielefeld 176 W. 225 656
—— v. C., St. P., M. & O. R. Co. 101 W. 352 - - - 215
Legault v. Malacker 166 W. 58 - - - - - - 537
Lemke v. Hage 142 W. 178 398
Lewis v. Binghamton R. Co. 35 App. Div. 12 - - - 515
Lindsey v. State 69 Ohio St. 215 - - - - - - 544
Loomis v. Besse 148 W. 647 91
Lounsbury v. Davis 124 W. 432 - - - - - - 398
Ludke v. Burck 160 W. 440 301–2
Ludvigson v. Superior S. B. Co. 147 W. 34 - - 7, 385
Luebke v. Salzwedel 157 W. 601 - - - - - - 55
Lyndon L. Co. v. Sawyer 135 W. 525 - - - - 285
Lynn G. & E. Co. v. Meriden F. Ins. Co. 158 Mass. 570 196
Lyon v. Grand Rapids 121 W. 609 - - - - - 414

Maas v. C. & N. W. R. Co. 156 W. 44 - - - - - 149
Maitland v. Gilbert P. Co. 97 W. 476 - - - - - 216
Marble Co. v. Ripley 10 Wall. (77 U. S.) 339 - - 158
Mason v. A. E. Nelson C. Co. 148 N. C. 492 - - 239
—— v. Ashland 98 W. 540 - 439
Matuschka v. Murphy 173 W. 484 - - - - 456, 561
McArthur v. Green Bay & M. C. Co. 34 W. 139 - 435
—— v. Moffet 143 W. 564 - 208
McConnell v. American Nat. Bank 59 Ind. App. 319 - 146
McCord v. Flynn 111 W. 78 96
McEvers v. Boyle 25 Cal. App. 476 - - - - - 123
McLean v. Bloomington 106 Ill. 209 - - - - - 616
Meath v. State 174 W. 80 - 479
Mechanical App. Co. v. A. Kieckhefer E. Co. 163 W. 647 - - - - - 15
Mehegan v. Faber 158 W. 645 - - - - - - 30
Meinert v. Roeglin 169 W. 531 - - - - - - 503
Melia v. Simmons 45 W. 334 592
Memphis C. G. & E. Co. v. Letson 135 Fed. 969 - 605
Menominee R. B. Co. v. A. Spies L. & C. Co. 147 W. 559 - - - - - - 204
Merrill T. Co. v. Hartford 104 Me. 566 - - - 591
Messer v. Oestreich 52 W. 684 - - - - - - 657
Meyer v. Doherty 133 W. 398 - - - - - - 59
—— v. Garthwaite 92 W. 571 503
—— v. Milwaukee E. R. & L. Co. 116 W. 336 - - 29
Midland T. C. Co. v. Ill. S. Co. 163 W. 190 - - - 425
Milbrath v. State 138 W. 354 59
Miller Scrap Iron Co. v. Boncher 173 W. 257 523, 527, 533
Milwaukee Co. v. Hackett 21 W. 613 - - - - - 625
Milwaukee & St. P. R. Co. v. Kellogg 94 U. S. 469 - - 196
Miranovitz v. Gee 163 W. 246 - - - 145, 146, 251
Mitchell v. Cox 28 Ga. 32 - 576
Mohr v. Williams 95 Minn. 261 - - - - - - 101
Montgomery v. Scott 10 S. C. 449 - - - - - - 304
Moritz v. Splitt 55 W. 441 - 360
Morrison v. Koch 32 W. 254 - - - - - - 251
Mueller v. Bruss 112 W. 406 82
Murphy, *In re*, 148 W. 292 - 554
Murphy v. Baldwin 159 W. 567 - - - - - - 448
Musbach v. Wis. C. Co. 108 W. 57 - - - - - 216

Nash v. Benari 117 Me. 491 575, 579
Neacy v. Milwaukee 171 W. 311 - 350, 353, 354, 357, 359

Newberry v. Smith 157 Mich. 181 - - - - - 123
Newman v. Luther 119 App. Div. 701 - - - - - 303
N. Y. C. & H. R. R. Co. v. York & W. Co. 256 U. S. 406 - - - - - - 19
Nichols v. Ruggles 76 Me. 25 - - - - - - 374
Nicholson's Case 1 East P. C. 346 - - - - - 544
Nicoll v. Modern S. S. Co. 143 W. 545 - - - 87
Noonan v. Orton 34 W. 259 435
North Carolina R. Co. v. Zachary 232 U. S. 248 - 193
Northern E. M. Co. v. H. M. Benjamin C. Co. 116 W. 130 - - - - - - 415
Northern S. Co. v. Wangard 117 W. 624 - - - 87
Northfield Nat. Bank v. Arndt 132 W. 383 - - 397
Northrup v. Trask 39 W. 515 614
Notbohm v. Pallange 168 W. 225 - - - - - - 648

Oberndorfer v. Pabst 100 W. 505 - - - - - - 232
Oborn v. State 143 W. 249 - 481
O'Brien v. C., St. P., M. & O. R. Co. 102 W. 628 - 216
O'Connor, *In re*. 6 W. 288 - 551
O'Dell v. Burnham 61 W. 562 - - - - - - 589
O'Donnell v. State 126 W. 599 - - - - - - 249
Ohrmundt v. Spiegelhoff 175 W. 214 - - - - - 251
Olivier v. Houghton Co. St. R. Co. 134 Mich. 367 - 530
Olson, Will of, 165 W. 409 503
Olson v. State 143 W. 413 - 480
Olwell v. Skobis 126 W. 308 398
O'Neill, Estate of, 90 W. 480 589, 591
Otjen v. Frohbach 148 W. 301 - - - - - 503, 505
Owens Co. v. Whitcomb 165 W. 92 - - - - 397, 416

Pabst B. Co. v. Milwaukee 126 W. 110 - - - - 329
—— v. Milwaukee L. Co. 156 W. 615 - - - - - 15
Pacific Mail S. Co. v. Western Pac. R. Co. 251 Fed. 218 - - - - - - 18
Page W. W. F. Co. v. Staudenmayer 174 W. 154 336
Parker v. Kane 4 W. 1 - - 632
Parsons v. Balson 129 W. 311 - - - - - - 591
Partee v. St. L. & S. F. R. Co. 123 C. C. A. 292 - 248
Patterson v. Wright 64 W. 289 - - - - - - 251
Peat v. C., M. & St. P. R. Co. 128 W. 86 - - - 216
Peck v. Sherwood 56 N. Y. 615 - - - - - - 616
Pederson v. Chipman 167 W. 348 - - - - - 182
Pennell v. Rumely P. Co. 159 W. 195 - - - 30
People, v. Buddensieck 4 N. Y. Crim. Rep. 230 - - 304
—— v. —— 103 N. Y. 487 - 304
—— v. Green 2 Wend. 266 - 115
—— v. Newberry 20 Cal. 439 549
—— v. Wheeler 142 Mich. 212 - - - - - - 477
Perry, *In re*, 30 W. 268 - 551
Peters v. Lynchburg L. & T. Co. 108 Va. 333 - - - 606
—— v. Reichenbach 114 W. 209 - - - - - - 419
Pietsch v. Milbrath 123 W. 647 - - - - - - 249
Pinoza v. Northern C. Co. 152 W. 473 - - - 301
Pittsburg, C., C. & St. L. R. Co. v. Fink 250 U. S. 577 - 19
Pliemling v. State 46 W. 516 - - - - - - 544
Plympton v. Boston Dispensary 106 Mass. 546 - 616
Poluckie v. Wegenke 137 W. 433 - - - - - - 449
Poole v. Tannis 137 W. 363 374
Porter v. Industrial Comm. 173 W. 267 - - - 645
—— v. Porter 51 Me. 376 - 373
Potter v. Robinson 40 N. J. Law 114 - - - - 50
Power v. Kane 5 W. 265 - 398
Pratt Institute v. New York 183 N. Y. 151 - - - 128
Price v. Mace 47 W. 23 - 575
Prideaux v. Mineral Point 43 W. 513 - - 237, 239
Provident Inst. for Savings v. Maloney 221 U. S. 660 - 593
Puffer v. Welch 141 W. 304 363
Pulp Wood Co. v. Green Bay P. & F. Co. 168 W. 400 - - - - - - 536
Purton v. Watson 2 N. Y. Supp. 661 - - - - 436

Quinn v. C., M. & St. P. R. Co. 141 W. 497 129, 133, 134

Rackemann v. Taylor 204 Mass. 394 - - - - 575
Radej v. State 152 W. 503 - 481
Rahm v. Cummings 131 Minn. 141 - - - - 374
Ramsay v. Ramsay 196 Ill. 179 - - - - - 576
Rayborn v. Galena I. W. Co. 159 W. 164 - - - 257
Raymond v. Sauk Co. 167 W. 125 - - - - - 491
Read v. Madison 162 W. 94 135
Reg. v. Gaylor 7 Cox C. C. 253 - - - - - - 549
Reismier v. State 148 W. 593 - - - - - - 480
Reiter v. Grober 173 W. 493 220, 223, 236–239
Rhyner v. Menasha 97 W. 523 - - - - - - 163
Rice, Will of, 150 W. 401 - 592
Rice v. Winters 45 Neb. 517 449, 450
Rindskopf v. Myers 87 W. 80 - - - - - - 81
Roach v. Sanborn L. Co. 140 W. 435 - - - - 537
Robbins v. Todman 28 Kan. 491 - - - - - - 146
Roberts v. Harrington 168 W. 217 - - - - 219
Robinson v. Pennsylvania F. Ins. Co. 90 Me. 385 - - 329
—— v. Wheeler 25 N. Y. 252 436
Roder v. Roder 168 W. 283 278
Rogers v. Rogers 53 W. 36 632
Roszcynialla, *In re*, 99 W. 535 - - - - - - 554
Rowell v. Smith 123 W. 510 182

St. Louis, I. M. & S. R. Co. v. Bragg 66 Ark. 248 - 304
—— v. McWhirter 229 U. S. 265 - - - - - - 642
San Juan L. & T. Co. v. Requena 224 U. S. 89 - 605
—— v. —— 4 Porto Rico Fed. Rep. 356 - - - 605
Schauer v. Bodenheimer 150 W. 550 - - - 382, 384
Scheer v. Ulrich 133 W. 311 591
Scheuer v. Manitowoc & N. T. Co. 164 W. 333 - - 195
Schillock v. Jones 147 W. 119 - - - - - - 392
Schlesinger v. Ellinger 134 W. 397 - - - - - 46
Schluckebier v. Babcock 104 W. 293 - - - - 175
Schmeling v. Kriesel 45 W. 325 - - - - - 373, 374
Schneider v. Schneider 124 W. 111 - - - - - 503
Schumaker v. St. P. & D. R. Co. 46 Minn. 39 - - 196
Schweikert v. John R. Davis L. Co. 147 W. 242 - - 257
Scott v. McNeal 154 U. S. 34 592
Sea Board Air Line Ry. v. Horton 233 U. S. 492 639, 640
Second Nat. Bank v. Smith 118 W. 18 - - - 222, 647
Seidl v. Paulu 174 W. 403 - 146
Semler, Petition of, 41 W. 517 - - - 547, 550, 554
Shanks v. D., L. & W. R. Co. 239 U. S. 556 - - - 193
Sheboygan Co. v. Gaffron 143 W. 124 - - - 115
Sheffield-King M. Co. v. Jacobs 170 W. 389 - - 157
Sheldon v. Davidson 85 W. 138 - - - - - - 251
Shinski, *In re*, 125 W. 280 - 554
Sikes v. Sheldon 58 Iowa 744 - - - - - - 304
Slowikowski v. Slowikowski 172 W. 460 - - - 278
Smith v. Reed 141 W. 483 383, 511, 517
Southern Wis. P. Co., *In re*, 140 W. 245 - - - 288
Sparling v. U. S. Sugar Co. 136 W. 509 - - - 55
Spencer v. C., M. & St. P. R. Co. 161 W. 474 - - 194
Spokane & I. E. R. Co. v. Campbell 217 Fed. 518 - 642
—— v. —— 241 U. S. 497 - 642
Spratley v. L. & A. R. Co. 77 Ark. 412 - - - 203
Staab, Estate of, 166 W. 587 591–2
Standard Mfg. Co. v. Slot 121 W. 14 - - - - 146
State v. Becker 9 Houst. (Del.) 411 - - - - 307
—— v. Bogue 52 Kan. 79 - 549
—— v. Brown 168 Mo. 449 - 544
—— v. Clifford 58 W. 113 - 105
—— v. Coulter (Mo.) 204 S. W. 5 - - - - - 307
—— v. Crowley 41 W. 271 - 486
—— v. Emery 78 Mo. 77 304–6
—— v. Fee 19 W. 562 544, 549
—— v. Gill 150 Iowa 210 - 477
—— v. Green 7 W. 676 - 486
—— v. Gumber 37 W. 298 - 275
—— v. Guyer 91 Vt. 290 - 478
—— v. Horner 266 Mo. 109 304, 306
—— v. Johnny Tommy 19 Wash. 270 - - - - 544

State v. Jones 53 W. Va. 613 477
—— v. Keithley 142 Mo. App. 417 - - - - - 477
—— v. Law 150 W. 313 - 106
—— v. Mausert 85 N. J. Law 498 - - - - - - 479
—— v. Milwaukee 145 W. 131 - - - - - - 285
—— v. Morgan 40 S. C. 345 307
—— v. Nangle 82 W. Va. 224 364
—— v. Woodward 191 Mo. 617 - - - - - - 544
State *ex rel.* Allen v. Lyon 45 W. 246 - - - - - 115
—— Ames v. Southwick 13 W. 365 - - - - - 116
—— Bessie v. Halsey 148 W. 171 - - - - - - 209
—— Bloomer v. Canavan 155 W. 398 - - - 287
—— Cook v. Houser 122 W. 534 - - - - - 363, 365
—— Drury v. Town Supervisors 67 W. 274 - - 402
—— Dunn v. Noyes 87 W. 340 - - - - - - 554
—— Durner v. Huegin 110 W. 189 - - - 548, 554
—— Ervin v. Vilas Co. 163 W. 577 - - - 288, 469
—— Gillen v. Braman 173 W. 596 - - - - - 623
—— Gottschalk v. Miller 136 W. 344 - - - - - 392
—— Hamilton v. Krez 88 W. 135 - - - - - 286, 288
—— Hemmy v. Miller 173 W. 412 - - - - - 282
—— Hudd v. Timme 54 W. 318 - - - - - - 115
—— Knutson v. Johnson 171 W. 521 - - - 108, 111
—— Kurath v. Ludwig 146 W. 385 - - - - - 647
—— Martin v. Kalb 50 W. 178 - - - - - - 625
—— Milwaukee v. Milwaukee E. R. & L. Co. 169 W. 183 - - - - - - 469
—— Milwaukee Co. v. Buech 171 W. 474 - - - 288
—— M., L. S. & W. R. Co. v. O'Connor 78 W. 282 392–3
—— M., St. P. & S. S. M. R. Co. v. R. R. Comm. 137 W. 80 - - - - - 274
—— N. W. Mut. L. Ins. Co. v. Circuit Court 165 W. 387 - - - 207, 273, 274
—— Off v. Smith 14 W. 497 - - - - - - 623
State *ex rel.* Owen v. Reisen 164 W. 123 - - - 439
—— Prince v. McCarty 65 W. 163 - - - - - 115
—— Rich v. Steiner 160 W. 175 - - - - - - 204
—— Risch v. Trustees 121 W. 44 - - - - - 287
—— Ronglien v. Clemenson 148 W. 268 - - - 392
—— Schuet v. Murray 28 W. 96 - - - - - - 623
—— Sommer v. Erickson 120 W. 435 - - - 625
—— Warden v. Knight 82 W. 151 - - - - - 115
—— Welch v. Sloan 65 W. 647 - - - 551, 553, 554
Steen v. Norton 45 W. 412 182
Steinkrause v. Eckstein 170 W. 487 - - - - - 642
Steuer v. State 59 W. 472 485–6
Stevenson v. Superior Court 62 Cal. 60 - - - - - 593
Stiles v. Neillsville M. Co. 87 W. 266 - - - - - 385
Stipp v. State 11 Ind. 62 - 549
Stoddard v. State 132 W. 520 - - - - - - 314
Stowell v. Eldred 26 W. 504 68
Strehlau v. John Schroeder L. Co. 152 W. 589 - - 537
Sullivan v. M., St. P. & S. S. M. R. Co. 167 W. 518 414, 641
Superior v. Ind. Comm. 160 W. 541 - - - - - 623
Superior C. L. Co. v. Dunphy 93 W. 188 - - - 175
—— v. Nichols 81 W. 656 614
Superior Water, L. & P. Co. v. Superior 174 W. 257 - 626
Swarthout v. Swarthout 111 W. 102 - - - 503, 506
Swoboda v. Rubin 169 W 162 - - - - - - 145

Tani, *Ex parte*, 29 Nev. 385 - 554
Taylor, *In re*, 45 L. R. A. 136 - - - - - - 554
Thompson v. Ketcham 8 Johns. 190 - - - - - 373
—— v. Nichols 254 Fed. 973 591
Thornley v. J. C. Walsh Co. 207 Mass. 62 - - - 577
Travelers Ins. Co. v. Pierce E. Co. 141 W. 103 - - 97
Tremelling v. Southern Pac. Co. 51 Utah 189 - - 642
Tryon v. Farnsworth 30 W. 577 - - - - - - 438

Tufts v. Weinfeld 88 W. 647 251
Tullgren v. Karger 173 W. 288 - - - - - - 652
Turner v. Southern P. Co. 154 N. C. 131 - - - 606
Turtenwald v. Wis. Lakes I. & C. Co. 121 W. 65 - 515
Tyler v. Thompson 44 Tex. 497 - - - - - - 576
Tyre v. Krug 159 W. 39 - 425

Union L., H. & P. Co. v. Lakeman 156 Ky. 33 - 606
Union Pac. R. Co. v. M. C. & Ft. D. R. Co. 199 U. S. 160 - - - - - - 238
U. S. v. Fenton 268 Fed. 221 488
—— v. Stoll 133 U. S. 1 - 488

Van Haltren v. State 142 W. 143 - - - - - - 296
Vetter v. Southern Wis. R. Co. 140 W. 296 - - 7
Virginian R. Co. v. Linkous 230 Fed. 88 - - - 642
Voelker v. C., M. & St. P. R. Co. 116 Fed. 867 - - 642
Vogel v. State 138 W. 315 549
Vorbrich v. Geuder & P. Mfg. Co. 96 W. 277 - - 216

Wallis v. First Nat. Bank 155 W. 306 - - - - - 370
—— v. —— 155 W. 533 25, 648
Wanzer v. Chippewa Valley E. R. Co. 108 W. 319 - 232
Ward v. Marshall 96 Cal. 155 - - - - - - 123
—— v. M. & St. P. R. Co. 29 W. 144 - - - - - 28
—— v. Munson 105 Mich. 647 - - - - - - 388
Warden v. Hart 162 W. 495 469
Waters v. Stickney 12 Allen (Mass.) 1 - - - - - 592
Watson v. Wilcox 39 W. 643 - - - - 448, 449
Waukesha Co. A. Soc. v. Wis. Cent. R. Co. 117 W. 539 - - - - - - 15
Wehr v. Gimbel Bros. 161 W. 485 - - - 25, 648
Weinhagen v. Hayes 174 W. 233 - - - - - - 9
Welsher v. Libby, McNeil & Libby 106 W. 291 - - 402
White v. M., St. P. & S. S. M. R. Co. 147 W. 141 - 134
Whiting v. Hoglund 127 W. 135 - - - - - - 631
Whitten v. Nevada P., L. & W. Co. 132 Fed. 782 - 605
Wilbraham v. Snow 2 Williams' Saunders' Rep. 87 59
Wilcox v. Porth 154 W. 422 360
Wilke v. Wilke 28 W. 296 - 632
Willard v. C. & N. W. R. Co. 150 W. 234 - - - 299
Williams v. J. L. Gates L. Co. 146 W. 55 - - - 249
—— v. State 45 Fla. 128 - 544
—— v. Williams 135 W. 60 506
Wilson v. Plank 41 W. 94 55
Wilton v. Mayberry 75 W. 191 - - - - - - 449
Winslow v. Crowell 32 W. 639 - - - - - - 614
Winter v. Winter 101 W. 494 - - - - - - 575
Wis. Cent. R. Co. v. Superior 152 W. 464 - - - 287
Wis. Ind. School v. Clark Co. 103 W. 651 - - 274
Wis. T. Co. v. Wis. M. & F. Ins. Co. Bank 105 W. 464 - - - - - - 592
Wisdom v. Wisdom 155 W. 434 - - - - 438, 448
Wittenbrock v. Parker 102 Cal. 93 - - - - - 146
Wolbert v. Beard 128 W. 391 - - - - - - 506
Woodman v. Nottingham 49 N. H. 387 - - - 304
Wright v. Young 6 W. 127 656
Wurdemann v. Barnes 92 W. 206 - - - - - - 652

Zimmermann v. Mednikoff 165 W. 333 - - - 233

STATUTES CITED.

CONSTITUTION OF WISCONSIN.

Art. I, sec. 6 - - 538
" I, " 7 - - 546
" I, " 9 169, 176, 366
" I, " 21 - 539, 555
" IV, " 18 - 283, 287
" IV, " 26 - 618, 624
" IV, secs. 31, 32 - 348, 352
" V, sec. 6 - 539, 555
" VI, " 4 - 107, 108, 112–116, 118
" VII, " 3 - - 366
" VII, " 12 - 113, 115
" XIII, " 3 120, 124, 130
" XIII, " 9 - - 286

SESSION LAWS.

1852. Ch. 477 - - - 125
1871. " 137 - - - 544
1889. " 35 - - - 286
1889. " 35, sec. 4 283, 285, 286
1903. " 360 - - 617, 622
1905. " 388 - - 617, 622
1907. " 87 - - - 33
1907. " 87, secs. 9, 10 - 31
1907. " 677 - - - 352
1913. " 189 - - - 133
1913. " 261 - - 14, 15
1913. " 592 - - - 620
1915. " 339, sec. 1 - - 439
1917. " 393 - - - 658, 660
1919. " 17 - - - 126
1919. " 334 - 269, 270, 272
1919. " 362 - 126, 131, 132
1919. " 362, sec. 14 120, 126, 128
1919. " 505 - 283, 285–289
1919. " 505, secs. 1, 2 - - 285
1919. " 658 - - 658, 660
1920. " 10 (Spec. Sess.) - 348, 351, 352, 359
1921. " 428 - - 620, 621

MILWAUKEE CITY CHARTER.

Ch. V, sec. 23 - - - 350

TERRITORIAL STATUTES OF 1839.

Art. I, sec. 7, p. 621 - - 131

REVISED STATUTES OF 1849.

Ch. 10, sec. 141 - - - 114
" 11, " 2 - - - 124
" 11, " 2, sub. 5 - 124
" 70, " 60 - - - 439
" 88, " 264 - - 131, 132

REVISED STATUTES OF 1858.

Ch. 120, sec. 234 - - - 132

REVISED STATUTES OF 1878.

Section 3427, sub. 2 - - 553
" 4375 - - - 553
" 4660 - - - 544

STATUTES (1898 and since).

Sec. *Page.*

17.02 - - 120, 124, 126, 130
17.03 - - - 126–128, 132
17.03, sub. (5) 120, 126–8, 131–4
43.08 - - - - - 131
59.12 - - - - 110, 114
59.15 - - - - 618, 625
61.35 - - - - 261, 263
61.35, sub. (4) - - 262, 264
62.09, " (2) - - 617, 623
62.09, " (6) (b) - 618, 625
113.09 - - - - - 620
925—90, 925—91 - - - 351
925—91*a* - - - 348, 351
925—115 - - 617, 622, 623
926—115 - 617, 618, 622–624
926—125*q* - 462, 463, 468, 470
959—46*d*, sub. 22 - - 363
959*w* - - - 348, 353, 354
1210*h*—1 *et seq.* - - - 183
1269 - - - - - 409
1270 - - - - 406, 409
1272, 1273 - - - - 407
1276, 1281, 1285 - - - 408
1286*a* - - - - 406–408
1289 - - - - - 408
1291 - - - - - 409
1362 - - - - 180, 181
1379—10*c*, sub. 1 - - - 614
1379—11 - - - - 607
1379—11, sub. 1 (a) to (g) - 608
1379—11, " 6 - - 607, 608
1379—18 - - - 607, 611
1379—31*w* - - - - 614
1569—3 - - - - 482–484
1569—8 - - - 482–484, 488
1569—13 - - - 482, 488
1636—49 - - 490, 562, 567
1636—52 - - - 290, 308
1636—52*a*, sub. 1 - 289, 290, 308
1636—52*a*, " 2 - - - 308
1675—7, " (2) - - - 373
1684*t*—42 - - - 334
1684*t*—45, sub. 2 - - - 334
1684*t*—47 - - - 393, 396
1684*t*—48 - 393, 394, 396, 416

STATUTES (1898 and since)—con.

Sec.	Page.
1684*t*—49	84, 86, 394, 399, 411, 415–16
1684*t*—67, sub. 3	331, 336
1684*t*—69, " 1 (a)	84, 86
1770*b*	403, 406
1770*b*, sub. 10	204
1797	366
1797—62 to 1797—68	230
1797*m*—1 to 1797*m*—109	660
1797*m*—69	366
1797*m*—81*a*	658, 660
1797*m*—81*a*, sub. 3	658, 660, 661
1797*t*—12	661
1809	29
1810	641
1861	271
1955*o*, sub. 2 (e)	70, 71
1955*o*, " 2 (e), (1), (2), (3)	72
1976	72
1976, sub. 1, 6, 7	72
1977, " 4	72
2041	495, 505
2278	501
2279	494, 500
2323	75, 79, 81
2394—3 to 2394—31	524, 534
2394—19	366
2394—21	366
2394—25	521, 523, 531, 534
2443	438
2594, 2595, 2596	364
2602	420, 425
2604	433, 441
2619	201, 269–273
2619, sub. 4	270, 271, 273
2619, " 5	269, 271, 274
2619, " 6	198, 202, 272
2619, " 7	202, 272, 273
2619, " 8, 9, 10	272
2625	617, 620
2637	401, 402
2637, sub. (13)	402
2647	420, 425
2829	563, 569
2858*m*	227
2878	646–648
2879	646, 648
2882	88, 90, 91
2883	88, 91
3047	361, 363–365
3048	364
3069	363
3069, sub. (2)	365
3072*m*	472, 480, 482, 489, 563, 569
3170	432, 440
3203*a*	129, 133, 361, 363, 365
3252	432, 440
3252–3293 (ch. 141)	440
3315, sub. 1, 5	331, 335
3408	554
3427	550, 557
3427, sub. (1), (2)	550
3428	550, 557
3793	577
3838–3868 (ch. 165)	437, 438
3838	432, 437, 438, 577
3840	432, 437
3843	432, 437
3844	432, 437, 571, 578
3845	437, 439
3846	571, 578
3935, sub. (6)	634
3962	580, 593
4071	471, 477
4096	35, 46, 74
4183	35, 36, 46
4190, 4191	386, 389
4222	321
4222, sub. (7)	580, 589
4253	432, 435, 439, 440
4254	435, 436
4255	521, 525
4320	48, 49
4337	289, 302
4346	550
4363	289, 302, 493
4365, 4367	289, 302
4417	479
4507	126, 131, 132
4589	472, 474
4613, 4614	538, 542
4658	484
4658, sub. (4)	482, 484, 485
4660	539, 542, 543, 549, 552
4669	544, 549
4712	540, 556
4720	103, 104, 106
4723	106
4935	120, 125, 127, 130–132
4971, sub. (22)	658, 660

TEXT-BOOKS CITED.

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Id. p. 1552 - - - - 543
Id. § 575 - - - - 545
4 Black. Comm. 28 - - 476

Century Dict. "Spavin" - 383
Cooley, Taxation, 416 - - 616
3 Corp. Jur. p. 319 - - 364
5 *id.* p. 75 - - - - 96
13 *id.* p. 686 - - - 429
14A *id.* pp. 1330, 1331 - - 206
16 *id.* p. 176, § 230 - - 547
18 *id.* pp. 1252, 1262 - - 477
20 *id.* p. 1077 - - - 661
24 *id.* p. 1124 - - - 578
24 *id.* p. 1125 - - - 577
26 *id.* pp. 1074, 1075 - - 382
Curtis, Law of Electricity, sec. 597 - - - - 605
7 Cyc. 180 - - - - 439
12 *id.* 135 - - - - 124
22 *id.* 171, 172 - - - 547
23 *id.* 729 - - - - 90
25 *id.* 1192, 1193 - - - 589
30 *id.* 1576, 1577 - - - 101
31 *id.* 214 - - - - 9
36 *id.* 1106, 1110 - - - 274
37 *id.* 45, 131 - - - 469
39 *id.* 528, 533, 545, 546 - 448
39 *id.* 1639 - - - - 229
40 *id.* 528, 529 - - - 436

3 Greenleaf, Evidence (16th ed.) § 129 - - - - 306

1 Hale, P. C. 616 - - - 549
1 Hawkins, P. C. (8th ed.) p. 5 - - - - - 476
2 Hawkins, P. C. 33, sec. 25 - 543

Jones, Evidence (2d ed.) § 842 - - - - - - 82

Kelley, Crim. Law & Prac. (3d ed.) p. 454, § 511 - 306
4 Kent, Comm. 74 - - 616

2 Lewis' Sutherland on Stat. Constr. § 397 - - - 204

2 McQuillin, Mun. Corp. sec. 528 - - - - - - 625
Morse, Arbitration & Award, 226 - - - - - - 96

4 Page, Contracts (2d ed.) §§ 2105, 2106 - - - 429
Id. § 2108 - - - - 430
1 Pomeroy, Eq. Jur. (4th ed.) § 447 - - - - - 157
1 *id.* p. 852 - - - - 157
3 *id.* § 1053 - - - - 449
Pomeroy, Spec. Perf. (2d ed.) sec. 376 - - - 432
Id. sec. 476 - - - - 656
Id. p. 482, sec. 395 - - 430

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7 *id.* p. 1010 - - - 239
9 *id.* p. 958 - - - - 264
10 *id.* p. 396 - - - - 182
11 *id.* p. 443 - - - - 578
11 *id.* p. 444 - - - - 577
12 *id.* p. 106, § 85 - - 205
12 *id.* p. 337, § 94 - - 146
12 *id.* p. 401, § 149 - - 146
13 *id.* p. 163 - - - - 469
13 *id.* p. 1083, §§ 106, 107 - 632
13 *id.* p. 1087, § 111 - - 633
21 *id.* p. 607, § 151 - - 9
25 *id.* p. 230, § 29 - - 158
25 *id.* p. 231, § 29 - - 157
26 *id.* p. 1101, § 8 - - 59
26 *id.* pp. 1232, 1348, 1351 - 448
27 *id.* p. 386 - - - 229
Ruling Case Law, 2 Supp. p. 1249 - - - - - 575

1 Schouler, Wills (5th ed.) § 591 - - - - - 506
2 *id.* §§ 1015*a*, 1174 - - 576
1 Shearman & Redf. Neg. (6th ed.) § 207*g* - - - 243
1 Sutherland, Stat. Constr. (Lewis' ed.) §§ 269, 270 - 128

1 Thompson, Comm. on Neg. (2d ed.) p. 55, § 52 - - 196
2 *id.* § 1463 - - - - 515
Thornton, Federal Liability of Railroads (3d ed.) § 307 642

Underhill, Crim. Ev. (2d ed.) § 482 - - - - - - 479

Wharton, Crim. Pl. & Pr. (8th ed.) § 220 - - - 485
Wharton, Homicide (3d ed.) § 445 - - - - - 306
Williston, Contracts, § 102 - 324

IN MEMORIAM.

ITHAMAR CONKEY SLOAN.

On the 14th day of March, 1922, Mr. Charles E. Pierce of Janesville presented the following

Memorial of the Rock County Bar Association.

May it please the Court:—ITHAMAR CONKEY SLOAN was born in Morrisonville, Mason county, New York, May 9, 1822. He received a common school education, taught school for a time during his student days, studied law in the office of Timothy Jenkins, of Oneida, New York, and on his admission to the bar was associated with Mr. Jenkins for a time in the practice of law, trying then the Oneida Indian cases.

In 1851 Mr. SLOAN moved to Janesville, Wisconsin. He at once took front rank with the leading members of the Rock county bar, then noted for the great ability of its lawyers. Among the members at that time were Matthew H. Carpenter, afterwards United States Senator, John B. Cassoday, afterwards Chief Justice of the Supreme Court, John R. Bennett and H. S. Conger, afterwards circuit judges, and Charles G. Williams and John Winans, subsequently members of Congress.

In 1852 he was married to Celestia E. Sears of New York. Mr. SLOAN was elected district attorney for Rock county in 1858 and 1860. He was elected Representative in Congress in 1862 and 1864. During his residence in Janesville he was a member of the law firms of Conger & Sloan and Sloan, Bennett & Patten. In 1874 he removed to Madison and formed a law partnership with Breese J. Stevens and W. A. P. Morris, the firm being Sloan, Stevens & Morris. During a portion of his brother A. Scott Sloan's term as attorney general he was assistant attorney general. For a number of years he was a lecturer in the Law Department of the University of Wisconsin and for ten years succeeding 1880 was Dean of the Law School. He continued in the practice of the profession down to about 1895, when he was compelled by failing health to retire from active work. From that time he resided on his farm near Janesville until his death December 24, 1898, at the age of seventy-six years. He was survived by his wife and three sons.

As a citizen Mr. SLOAN was a true American, a firm believer in a representative government, and was a citizen up to the highest standard. During the Rebellion he served on a committee con-

sisting of the late Justice CASSODAY and M. C. Smith, a prominent merchant of Janesville, now deceased, which committee and its several members contributed largely from their own private funds and from their own time and materially assisted in the effective work done by the citizens of Rock county in those trying days of this great republic.

As an official he performed the duties of the several offices held by him with great energy, efficiency, and distinction; as a teacher in the Law School he assisted many of the best practitioners in this state and neighboring states in laying the foundation of their learning as lawyers; he was most efficient, and his teachings have made a lasting impression on the minds and memories of all of his pupils. As a friend and neighbor he was kind, genial, entertaining, and instructive.

He was a man of commanding presence, great dignity, truly modest and self-contained, who thought clearly on every subject and who expressed himself simply and understandingly. He was patient, kind, and instructive with young men desiring help and advice in their cases and in assisting the young man to properly interpret and apply the law. He had a keen sense and appreciation of humor and had a dry humor that was greatly enjoyed by his friends. With sham, pretense, and ignorance he had neither time nor patience.

It is as a lawyer that Mr. SLOAN stands among the highest type of lawyers who practiced before the courts of this state or elsewhere. As said by the late Judge BENNETT: "It was universally known by the lawyers of the state of Wisconsin in his time that I. C. SLOAN was the greatest of them all." And as said by another of his colleagues: "He did not prepare or deliver addresses before the public on any topic. He made no effort towards oratorical display. His strength was in his great power of analysis and logical and accurate expression of conclusions. He was forcible and extremely persuasive in argument." As said by Mr. Winans, one of his contemporaries: "In discussing the questions of fact he was logical, but his strength was manifested in the discussion of legal questions in courts of last resort, dealing with principles of law and the reasons underlying them and governing their application. His handling of decisions was masterful, but to his credit be it said that he was not a case lawyer. His penetrating and analytical mind inclined him to seek for and rely upon foundation principles as the best guide to correct conclusions."

Mr. SLOAN had a remarkable memory, and he seemed to know from intuition where to look for the law he wanted to find. He had no respect for a decision that did not rest upon sound principles of the law and right. To command his respect a decision must have for its foundation the right principles of law and equity cor-

rectly applied. He was not a man who desired to win a lawsuit for the mere sake of winning. To him it was more important that a court should correctly decide the issue and correctly apply the law and equity that existed in the matter in controversy. He viewed the law as a great science for the purpose of adjusting the rights of the human race. He first tested every question on the great principles of right and wrong.

Mr. SLOAN in his time was engaged in many of the most important cases litigated in this state. Among those was *Whiting v. Sheboygan & Fond du Lac Railroad Co.* 25 Wis. 167. This was a leading case on the question of municipal aid to railroads, then a new question. The distinctions made by him in that case as to the right of taking public money for the use of corporations, and the right of eminent domain, and the respective rights of the people, are the best illustrations of the logical and analytical power of his mind and of his ability to distinguish and apply the principles of law and equity. He rendered to the people of this state, as well as to the nation, great services in the litigation growing out of the Potter Law, sometimes known as the *Granger Cases,* 35 Wis. 425, 94 U. S. 164. In these cases he was associated with Justice Dixon, but owing to Mr. Dixon's ill health the arguments before the Supreme Court of the United States in Washington were presented solely by Mr. SLOAN. He was opposed in the United States court by Mr. Wm. M. Evarts, W. E. Stoughton, and other lawyers of great prominence.

It must be borne in mind in those cases that by the Potter Law for the first time this state sought to regulate the charges of the railroads. Governor Taylor, then governor of the state, sought the opinions of the leading lawyers and jurists of the United States, including Mr. Evarts and Judge Cooley, all of whom advised the governor that the law was unconstitutional. The governor then asked the attorney general if there was any great lawyer to whom he desired to submit the question. The attorney general sought out Mr. SLOAN. He filed an opinion upholding the law and was then appointed by Governor Taylor as assistant attorney general to enforce the law.

It must be borne in mind that at that time the regulation of public utilities was a new question, and the power of the legislatures of states and the United States to regulate charges was doubted by the greatest lawyers of the land. Mr. SLOAN, practically unaided, established first in this court and afterwards in the Supreme Court of the United States the principle that the legislatures of the states and United States had a right to fix the charges of railroads or public utility corporations. No one man as a lawyer has ever performed a greater service for the people of this country. Mr. SLOAN demonstrated in that action that he not only knew what the law was but what it should be, following the principles

of right. And his keen, analytical, and logical mind convinced the court of last resort of the correctness of his position, although he was opposed by the greatest lawyers of the United States. Those who know and heard this argument say that it was equal if not superior to any argument made on kindred subjects.

In addition he was engaged in the Sturgeon Bay cases, the Land Grant cases, the Chippewa river litigation, and the Ford will case. His worth as a lawyer in this state and in the United States will last as long as the principles of right and the power of the government over corporations are maintained.

His great ability not only manifested itself in dealing with the principles of law and the reasons underlying and governing their application, but it was used by him to the great good of the people and this government, making him stand out in this state without a superior as a lawyer. He was not a theorist. His mind was that of a broad-minded, constructive lawyer who believes implicitly in the principles of the right and that the law will follow those principles and, properly applied and understood, would at all times work out justice between man and man and work for good government. His stands out as a great and master mind which not only ably assisted but in fact established precedents that protect alike all citizens of this country and preserve the representative character of our government.

GEO. C. SUTHERLAND.
EDWARD H. RYAN.
JOHN M. WHITEHEAD.
CHARLES L. FIFIELD.
CHARLES E. PIERCE.

On behalf of the court Mr. Justice OWEN responded as follows:

The character of no human activity more nearly approximates the divine work, or calls for more exalted ideals or sensitive faculties, than the practice of the law. It is regarded as a noble calling, and he who measures up to those qualities of heart and mind that make the really great lawyer is a really useful man.

ITHAMAR CONKEY SLOAN possessed those qualities. By common consent he was accorded the highest standing in his profession—ranked among the greatest lawyers of our state, and by many would be voted as the very greatest. Few there are who would be ranked above him by the common judgment of the bar of his, or of the present, time.

Mr. SLOAN had an extraordinary mind—a mind that was alert, broad, and strong; a mind characterized by a strong grasp, ready comprehension, and matchless powers of logic. As a student in

his lecture room I used to think that to him the fundamentals of the law, which are the culmination of centuries of the best thought and reasoning, were mere aphorisms, and I firmly believe that, without the light of prior discussion which illuminates the way of the legal investigator, his unerring logic would lead to those conclusions which are now intrenched in and known to our jurisprudence as the fundamentals of the law. His discussions were always anchored to fundamental principles, of which his opponents were not permitted to become unmindful. A good example of this is his opening sentence in his brief filed in opposition to a motion for rehearing in the case of *Whiting v. Sheboygan & Fond du Lac Railroad Co.* 25 Wis. 167, where he said:

"It is almost incredible that the question which we are so gravely called upon again to discuss in this case is, Whether the legislature of this state has the constitutional power, under the pretense of taxation, to take an unlimited amount of the property of the people of Fond du Lac county and transfer it to the stockholders of the Sheboygan & Fond du Lac Railroad Company? In considering it there is an obvious necessity to call attention to some of the elementary principles of law, and some of the fundamental rights of the individual members of political organizations known as states or nations, which have been wholly lost sight of by our opponents in this discussion."

Later on he said:

"The argument of opposing counsel is full of assertions that the question involved in this case has been decided by a current of authorities which it is presumption on the part of any one now to controvert and the opinion of Justice PAINE proceeds upon the same assumption. But the only authorities cited, which require notice, to make good these assertions, are those holding that the power of eminent domain may be exercised in behalf of a railroad company to enable it to take the right of way upon making full compensation to the owners of the land taken. It is said that the power of eminent domain can only be exercised when the property is taken for a public use. And it is assumed that the same public use which will authorize a right of way to be taken under the power of eminent domain will also authorize money in unlimited amounts to be raised by taxation, and paid over to such individuals or private corporations as the power of eminent domain can be exercised in favor of. Now this is begging the whole question under discussion, and it is very remarkable that neither in the argument of counsel, nor in the opinion of Justice PAINE, is there any attempt to show, either by reason or authority, that the same kind of public use which will justify the exercise of the power of eminent domain in favor of a private corporation will also authorize the exercise of the power of taxation in its favor. These two branches of sovereign power are distinct and proceed upon different principles."

The principle he then advocated is quite obvious at this time,

but that it was not so plain then is evidenced by the fact that it was adopted by a bare majority decision, and that Mr. Justice PAINE dissented from the decision of the court with his characteristic force and vigor.

And this reminds us that Mr. SLOAN lived at a time when rules for the determination of justice were in the making in this state. This required a refined sense of justice and a broad understanding of fundamentals. He possessed both to a high degree, coupled with a clarity of thought and lucidity of expression which enabled him to forcibly impress others with the truth of his contentions.

He was privileged to participate in some of the most important litigation arising in this state, involving the most intricate and obscure questions, and thus to contribute much to the establishment of enduring rules of justice within his state. Who can measure the extent of his influence upon the formulation of those just and sound principles which won for this court during its earlier history an enviable standing throughout the nation? Nothing contributes so much to make a strong court as a strong bar, and nothing so aids a court in arriving at correct conclusions as learned argument from the bar. Mr. SLOAN never argued that he did not elucidate. Always he saw clearly the relation of facts and law, and understood the fundamental principles which alone could form a sound basis for an enduring decision. Fortunate, indeed, is any court to have the benefit of the strong and clear presentations which characterized the work of Mr. SLOAN at the bar. The benefits of his great mind were not confined to the immediate results secured in behalf of his clients, but it has unquestionably left an impress upon the jurisprudence of this state which inures to the benefit of future generations.

Among the important cases which he argued before this court were many involving questions of public importance, among which may be mentioned *Whiting v. Sheboygan & Fond du Lac Railroad Co.* 25 Wis. 167, and *Attorney General v. Railroad Cos.* 35 Wis. 425. In both of these cases he represented the interests of the public. In the first case it was established that the property of an individual could not be taken, through the guise of taxation, and bestowed upon a railroad company, and the distinction between a public use for the purposes of taxation and for the purposes of eminent domain was clearly defined.

In the case of *Attorney General v. Railroad Cos.* he represented the public interest in the capacity of assistant attorney general. Many important questions were involved in that case. The supervisory power of the state over its public-service corporations was there established, and the power of the state to repeal, alter, or amend the charters of all corporations was there declared. Anything like a thorough review of his life-work as a lawyer would lead irresistibly to the conclusion that he left an abiding

impress upon the jurisprudence of this state and that he is worthy to be ranked with Wisconsin's greatest men.

While our admiration for the man is based upon his great natural powers and abilities and his work at the bar, nevertheless a source of his wholesome usefulness is traceable to the influence which he exerted over the students through his connection with the Wisconsin Law School. He served in this institution as Professor of Law from 1875 to 1885; as Dean and Professor of Law from 1885 to 1889, and as Professor of Law from 1889 to 1894, during which time approximately 800 students were graduated therefrom. It is safe to say that the great bulk of these graduates took up the practice of law in the state of Wisconsin, inspired by the high ideals of the legal profession so profoundly entertained by Mr. SLOAN.

While he had a forbidding exterior, he was nevertheless a kind and benevolent character. He was popular with the students. He possessed what I would term an ironical humor, and often employed it to disillusionize some listless student who thought perchance he was fooling the Professor by sham and verbosity. Such a student was very likely to be the target of his ironical sallies, much to the pleasure of the class and to the passing discomfiture of the student. It was not in the nature of mean or sarcastic ridicule which left a cutting and permanent scar upon the disposition of the student, but rather a passing sally, quickly forgotten, but quite sufficient to admonish the student that his derelictions were not unnoticed.

He bowed to judicial authority, but he yielded respect to judicial pronouncements only when supported by that pure, clear logic at his command and when based upon sound fundamental principles. Not infrequently, in the lecture room in the Wisconsin Law School, would he point out the fallacy of a court decision, showing its departure from the sound fundamentals of the law in a way that enabled the embryonic student to appreciate the difference between mere court decisions and the science of the law. He did this in a way calculated to inspire the student not with a disrespect for courts, but with an admiration for the science of the law. While it may perhaps be said that he regarded many judicial decisions with scant respect, he nevertheless had a most sensitive appreciation of the functions of the judiciary and revered the institution of the court.

ITHAMAR CONKEY SLOAN lived a life of striking usefulness to his fellows and to posterity. It abundantly entitles him to have his name preserved in the public annals of his state, and to that end the memorial and this response will be placed on file as a part of the records of this court, as a deserving though inadequate tribute to his great ability and to the worth and usefulness of his life.

CASES DETERMINED

AT THE

January Term, 1922.

NELSON, Respondent, vs. PAULI, Appellant.

December 13, 1921—January 10, 1922.

Automobiles: Pedestrian waiting for street car: Contributory negligence: Damages: Broken ankle: Gratuitous medical services: Trial: Pleadings as evidence: Argument as to effect of jury's answers: Harmless error: Special verdict: Question as to unavoidable accident.

1. In an action by a pedestrian for injuries sustained by being run down by defendant's automobile, which was attempting to pass another automobile at a point where plaintiff was waiting for a street car, an answer in a special verdict that plaintiff was not negligent is *held* to be amply sustained by the evidence.
2. A verdict of $10,000 in favor of a motorman sixty-three years of age and having a life expectancy of twelve years, while high is not excessive, where it appears he sustained a painful injury to his ankle which left a stiffened joint and a shortened limb with no chance of substantial improvement, and that besides incurring a large expense for medical and hospital service plaintiff had up to the trial sustained a loss in wages of $2,000.
3. Admissions contained in the pleadings of the opposite party may be read to the jury in the argument of counsel without having been specially offered and admitted in evidence.
4. The defendant was not prejudiced by the refusal of the court to permit an allegation in plaintiff's complaint, that it was dark at the time of the accident, to be read to the jury on the ground that it constituted an admission that it was dark at such time, the word "dark" being a relative term and not necessarily meaning the entire absence of all light or ability to see things.
5. In answering questions submitted to them it is no part of the function of the jury to determine what effect their answers will have upon the final outcome of the trial; but misconduct

of plaintiff's attorney in informing the jury that if they answered "Yes" to a question as to whether plaintiff was guilty of contributory negligence he would have no claim against the defendant was not prejudicial, where the court fully sustained objections of defendant's counsel thereto and fully admonished the jury, plaintiff's case possessing unusual strength and merit upon the question of contributory negligence.

6. Where the vital questions involved were the negligence of the defendant, proximate cause, and contributory negligence, it was not prejudicial error to refuse to submit to the jury, as a part of the special verdict, the question "Was plaintiff's injury due to an unavoidable accident?"

7. An instruction, "You will also consider the reasonable value of the medical services which the plaintiff received," was not prejudicial in that the evidence disclosed that plaintiff received gratuitous services from certain doctors connected with a mutual benefit association of which he was a member. where only the value of the services of the doctor he hired to treat him was properly proved on the trial and the jury were instructed that they should name such sum as would compensate the plaintiff, as it could not consistently be claimed that the jury either considered or made any allowances for services rendered by the physicians rendering the gratuitous services.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

Action for personal injuries. The appeal is from a judgment in favor of the plaintiff and against the defendant for the sum of $10,376.79, damages and costs.

The following appears from the evidence: Downer avenue is a public street in the village of Shorewood, Milwaukee county, running north and south, and is intersected at right angles by Edgewood street towards the south and Morse avenue towards the north. The width of Downer avenue from curb to curb is forty-five feet, and the length of the block from the north curb of Edgewood to the north curb of Morse avenue is about 350 feet. Located on Downer avenue between the intersecting streets above referred to is a single street-railway track used by the Milwaukee Electric Railway & Light Company on which to propel its electric cars for passenger traffic. There is a distance of about

fourteen feet from the west rail of said track to the west curb of Downer avenue, and a distance of about twenty-five feet from the east rail of said track to the east curb of said Downer avenue.

Plaintiff was a motorman of the age of sixty-three years and had been employed as such by said street railway company for a period of about twenty-two years. On the 19th day of November, 1919, at about 5:45 p. m. of that day, he was standing on the walk near the southeast corner of Downer avenue and Morse avenue, intending to board a Downer avenue car going north. In looking towards the south he saw a street car, headed towards the north, stopping at the near crossing of Edgewood, and as the car started he proceeded to walk out into the street towards the track, and there stopped awaiting the approach of the car, and at that time the car had arrived at a point about three car-lengths south of where plaintiff stood. A number of automobiles were traveling northward alongside of the street car as it left Edgewood, and as these autos approached Morse avenue the plaintiff observed that the car which preceded the others was an electric.

The defendant, as the street car left Edgewood, drove his seven-passenger auto in the rear of the electric, which was proceeding northward between the track and the east curb. When the north-bound street car had arrived at a point about one car-length south of the south crossing of Morse avenue, the defendant, who was driving his car at the rate of about eighteen miles per hour, in order to pass the electric auto steered his car towards the northwest immediately in front of and in close proximity to the street car, and then towards the northeast, so as to proceed along on that portion of Downer avenue lying east of the street-car track. When the defendant, in the effort to pass the electric auto, swerved his car towards the northwest, the plaintiff was standing at a point about two to three feet east of the east rail of the street-car track, and it was testified to

by him that when he saw defendant's car headed towards the northwest he concluded that it was the intention of the driver to proceed in that direction, and in that event there would be no danger whatever to him at the point where he was then standing. The plaintiff had just observed the motion of defendant's car in a northwesterly direction, when suddenly and unexpectedly he observed the same being turned to the northeast so that he would be directly in the path of defendant's car. In an effort to escape from the danger which then apparently confronted him he moved rapidly towards the west and almost succeeded in clearing the pathway of defendant's approaching car, but was struck by the left fender, as the result of which he suffered a severe injury to his left leg, causing a number of fractures in and around the ankle and the lower shin bone and in and about the ankle joint. On account of the nature of the injury it was impossible to set the limb, and the attending physicians concluded to and did operate at the point of the injury, and then found numerous splinters and pieces of broken bones, many of which they removed. The good ends of the broken bones were then wired, after removing as many splinters as possible, and as the result of the mashed condition of the injured limb and the dead tissues around the injury an infection set in which gave the medical attendants considerable cause for apprehension, but which was finally allayed. As the result of the injury the injured ankle has become permanently stiffened.

Dr. Differt, one of the attending physicians, testified that in his opinion there is no chance for substantial improvement of the injured limb as to action or movement, and that from time to time while the physicians visited the plaintiff he found pus exuding from the injured portion of the limb and that small portions of bone were expelled.

Plaintiff testified that he still suffers considerable pain, and it appears that the limb is shortened one and one-half to two and one-half inches. At the time of the accident plaint-

iff was earning $5.64 a day, and his monthly earnings were between $160 and $165. According to the evidence introduced, the mortality tables show that plaintiff at sixty-three years of age has an expectancy of life of about twelve years.

There is no substantial or material conflict in the evidence as to the manner in which the injury occurred. No signal was given by the defendant preceding the accident. At the time of the accident it was not very dark and the lights were lit on the automobiles, and there was a light from Edgewood street, and the street car was also lighted.

The case was submitted to the jury on a special verdict, which found (1) that the defendant failed to exercise ordinary care in the management and control of his automobile at and immediately prior to plaintiff's injury; (2) that such failure was the proximate cause of the injury; (3) that the plaintiff was not guilty of a want of ordinary care which proximately contributed to produce the injury; and (4) damages in the sum of $10,000.

After verdict the defendant's counsel moved to change the answer of the third question of the special verdict from "No" to "Yes," and for judgment upon such verdict as so changed. The refusal of the court to grant such motion constitutes defendant's first assignment of error.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *Walter D. Corrigan,* of counsel, all of Milwaukee, and oral argument by *Mr. Corrigan.*

For the respondent there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

DOERFLER, J. We have carefully examined the evidence in the case and are convinced that the answer of the jury to the third question of the special verdict was amply sustained thereby. When plaintiff left the curb near the southeast corner of Downer avenue and Morse avenue he proceeded to occupy a place upon the highway usually occupied

by pedestrians when intending to board a street car. The street-car track was west of the center of Downer avenue, and the distance between the east rail and the east curb of the street was fully twenty-five feet. There was ample space for automobiles to pass at least two abreast north on the avenue without in any manner interfering with plaintiff's safety while he was standing two or three feet east of the east rail of the track awaiting the approach of the street car. It is also quite clear that if the plaintiff had not assumed the position on the highway preparatory to entering the car when he did, and had waited at or near the curb until the string of automobiles approaching had fully passed, there might have been danger of his missing the street car.

The defendant was aware that the street car had stopped at Edgewood, and the evidence shows that in order to permit passengers to be discharged from or to board the car at that point he was obliged to stop his car in the rear of the electric auto. He knew that the street car was proceeding northward from Edgewood to Morse avenue and that there were a number of other autos proceeding northward on the right-hand side of Downer avenue. He was familiar with the location of the streets, as he had lived in that locality for a considerable number of years. It must be presumed that he knew, and undoubtedly he did know, that there was a likelihood of the street car coming to a stop as it approached Morse avenue for the purpose of permitting passengers either to board or alight from the car, and that in order to take passage upon the car it would be necessary for a pedestrian to stand in close proximity to the car at a point where it is usual and customary for pedestrians to stand under like circumstances.

The plaintiff, therefore, was duly justified in occupying the position he did preparatory to boarding the car, and, whether or not he knew of the approach of the defendant's auto immediately in the rear of the approaching electric auto, he had a right to assume that the defendant in the operation

of his car would not make the sudden and decisive turn first towards the northwest in endeavoring to pass in close proximity the moving street car and the electric auto, and then suddenly turn his machine towards the northeast so as to place the plaintiff in the direct pathway of his approaching car. In fact, it appears to us quite clearly that the action of the defendant in so steering his car resulted in placing the plaintiff in a dangerous trap, from which it was difficult to extricate himself without great danger of sustaining injury. No signal was given by the defendant to warn the plaintiff of the approach of his car. Under these circumstances it would almost appear as though the plaintiff was free from contributory negligence as a matter of law. In any event the evidence is strong in plaintiff's favor, tending to prove his freedom from contributory negligence; and the jury having acquitted the plaintiff of the charge of contributory negligence, we cannot, under the numerous decisions of this court, set aside the answer of the jury to the question of the special verdict in that behalf. *Vetter v. Southern Wis. R. Co.* 140 Wis. 296, 122 N. W. 731; *Friedrich v. Boulton,* 164 Wis. 526, 159 N. W. 803; *Ludvigson v. Superior S. B. Co.* 147 Wis. 34, 132 N. W. 621.

Defendant's counsel also moved, for reasons hereinafter named, to set aside the answers to the questions of the special verdict and to grant a new trial:

First, because the jury's answer to the third question of the verdict was perverse and against the overwhelming weight of the evidence. This matter has already been amply covered in this opinion by what has heretofore been said and therefore requires no further consideration.

Second, because the damages were so excessive as to indicate such a degree of perverseness as to invalidate the entire verdict.

In determining whether the damages are excessive, each case must in a large degree stand upon the facts therein adduced. It is true that where a state of facts exist in a case

which are similar to the case under consideration, the rulings of a court may be of great value in guiding the judicial mind in the determination of the question as to whether or not the damages are excessive. The evidence in this case shows that plaintiff sustained a very severe and painful injury; that the injury resulted in a permanent disability; that he suffered not only considerable pain, but that at the time of the trial he was still suffering great pain, and that his limb was in a condition which needed considerable attention by reason of the fact that from time to time pus would be exuded from the injury and small broken pieces of bone would be expelled therefrom. At the time of the trial in the lower court he had already sustained an actual loss in wages amounting to about $2,000. He incurred a considerable bill for medical and hospital attendance. He was sixty-three years of age, and, according to the tables of mortality, had an expectancy of life of twelve years.

In the case of *Hommel v. Badger State Inv. Co.* 166 Wis. 235, 165 N. W. 20, where the plaintiff was sixty-two years of age and sustained injuries somewhat similar to those of the plaintiff in this case, and where the evidence showed that she had an earning capacity of $800 per annum, it was declared that it requires from $4,000 to $5,000 to provide an annuity of $800 for a person having an expectancy of twelve years. The verdict in the *Hommel Case* was sustained on an appeal to this court. If to purchase an annuity entails the expenditure of the sum of $4,000 for one having an expectancy of twelve years, where the earning power does not exceed $800 per annum, it certainly cannot be claimed that the amount awarded for loss of earnings in the instant case is excessive. While it appears to us that the amount awarded is high, nevertheless the award of damages is peculiarly within the province of the jury, and unless the verdict is such as to create the belief that the jury was misled by passion, prejudice, or ignorance, this court will not interfere therewith. *Flannigan v. Stauss,* 131 Wis. 94, 111 N. W. 216.

Third, because defendant's counsel was not permitted to read from plaintiff's complaint during the argument to the jury.

Can admissions contained in the pleadings of the opposite party in an action be read to the jury on the argument of counsel without having been specially offered and admitted in evidence? In the instant case defendant's counsel, in his closing argument to the jury, attempted to read a portion of plaintiff's complaint wherein it was alleged in substance that at the time of the happening of the injury the hour was about 5:45 p. m. and that it was dark. A number of witnesses on the trial testified that they could see the plaintiff for some considerable distance. Plaintiff's own testimony as to the degree of light or darkness prevailing at the time is somewhat in conflict. The defendant claimed that at the time of the happening of the injury it was dark; in fact, so much so that he did not see the plaintiff until he appeared coming out from the front of the electric auto. Defendant's counsel therefore claim that there being an allegation of plaintiff on the subject in his complaint, and inasmuch as the pleadings in an action constitute the fundamental basis upon which the cause of action rests, which allegations it is contended must be construed as verities against the one pleading, it was error not to permit counsel to read the portion of the pleading above referred to during the course of the argument.

"When a fact is admitted upon the pleadings, no proof respecting it need be introduced, and it may be presented to the jury as part of the evidence in the case." 31 Cyc. 214. See, also, 21 Ruling Case Law, p. 607, § 151; *Weinhagen v. Hayes,* 174 Wis. 233, 178 N. W. 780, 183 N. W. 162.

Plaintiff's counsel cite the case of *Folger v. Boyinton,* 67 Wis. 447, 30 N. W. 715; but in that case the original complaint had been materially amended. In the opinion in the case last cited this court said: "To read that complaint to the jury would not be reading any part of the pleadings in the cause."

It is our opinion that defendant's counsel is right in his contention, and that such pleadings were in evidence as much as the evidence adduced from the mouths of the witnesses attending upon the trial.

It therefore follows that the refusal of the court to admit the reading of such admissions in the pleadings may in some cases constitute prejudicial error which would work a reversal. However, the word "dark" is but a relative term. We speak of a day as a "dark day," meaning a cloudy day; a day without sunlight. In common parlance we speak of the time of the day when one can see without the aid of artificial light as day-time, and distinguish it from night-time on that basis. When the time arrives in which things cannot be seen clearly without the aid of artificial light, we say that it has become dark. Darkness does not necessarily mean the entire absence of all light or ability to see things. In fact, such a condition seldom prevails. So that when the pleader, in the allegation referred to, declares that the accident happened at a certain time and that it was dark, he intended to convey the idea that a time had arrived during the day when it was necessary in a large degree to see things by the aid of artificial light. We often hear the expression "It was dark, but I could see an object a distance of one, two, or three hundred feet," and on other occasions we say, "It was so dark that one could not distinguish an object in close proximity;" all of which conclusively proves that the use of the word "dark" involves a relative expression. It was therefore for the jury to determine from all the evidence in the case the extent of the absence of light at the time of the happening of the injury, and the refusal of the court, therefore, to permit the reading of the portion of the complaint referred to did not constitute prejudicial error.

Fourth, because of improper argument of plaintiff's counsel to the jury.

During the course of the argument of plaintiff's counsel to the jury on the subject of the third question contained in

the special verdict, it was contended by defendant's counsel that he made the statement that, if the jury answered question number 3 "Yes," plaintiff would have no cause for action. Upon objection being made to such alleged argument by defendant's counsel, plaintiff's counsel, in an effort to correct defendant's counsel's statement, contended that he did not say that plaintiff would have no cause for action if the jury answered this question by "Yes," but that he did say he would have no claim against the defendant. The court thereupon sustained the objection of defendant's counsel and admonished the jury to disregard the remarks of plaintiff's counsel. The court further added: "You will answer the questions, gentlemen, according to the instructions given you by the court later on, without regard to what may be done with the case after the court has received your verdict."

In accordance with the statutes permitting the submission of a special verdict to a jury, it is contemplated that the jury be required to answer certain questions submitted to them upon the evidence in the case and in accordance with the instructions of the court. It is no part of the jury's function to determine what effect its answer will have upon the final outcome of the trial, and in fact juries are instructed to answer the questions of the special verdict without regard to what effect their answers will have upon the final result. This is the policy of the law as viewed by the authorities wherever special verdicts are in vogue. Such policy is well known to all attorneys engaged in the trial of cases. A violation of this well known policy on the part of an attorney involves an effort on his part to procure from a jury an answer to a question not in accordance with the evidence, but in accordance with the ultimate effect which an answer may have upon the final outcome of the trial.

Such misconduct on the part of counsel, if wilful, can only be designed with a view of procuring a favorable answer to the question of the special verdict, based not upon

the evidence but upon the final result. The office of an attorney at law is essential in the administration of justice under our judicial system. He is held by some courts to be a *quasi*-judicial officer, with a dual function, namely: first, to aid in the administration of justice, and second, to represent the interests of his client. An attorney so transgressing the fundamental policy of our system of jurisprudence is not aiding the administration of justice. We therefore consider that such infractions of counsel, constituting an abuse of their powers, is a very serious matter, and one which in many instances works a reversal of the judgment. However, in the instant case the court fully sustained the objections of defendant's counsel and fully admonished the jury. Under similar circumstances in the case of *Behling v. Wis. B. & I. Co.* 158 Wis. 584, 149 N. W. 484, this court has held that the error was cured.

We do not wish to be understood, however, that in a close case, where there is but a slight preponderance of the evidence, we would not seriously consider such an assignment of error and reverse the case solely upon such ground. As already stated in this opinion, plaintiff's case possesses unusual strength and merit upon the question of contributory negligence, and under all the facts and circumstances in the case we hold that the error committed is not prejudicial.

The defendant requested the court to submit the following question as a part of the special verdict: "Was plaintiff's injury due to an unavoidable accident?" The refusal of the court to comply with defendant's request constitutes the *fifth* assignment of error.

There are negligence cases where such a question might properly be submitted to the jury as involving an ultimate fact essential in the determination of the issues presented. We are, however, of the opinion that the instant case is not such a one. The vital questions involved in this case are, first, the negligence of the defendant; second, the proximate cause; and third, contributory negligence.

In *Kellner v. Christiansen,* 169 Wis. 390, 395, 172 N. W. 796, where the submission of a similar question was requested by defendant's counsel, this court, Mr. Justice SIEBECKER rendering the opinion, held:

"The inquiry whether the plaintiff's injuries were the result of mere accident for which no one was responsible was necessarily included in the questions covering defendant's negligence and the question of its being the proximate cause of plaintiff's injuries. In view of this, the proposed inquiry was covered by the findings of actionable negligence and proximate cause."

In accordance with what has been said on this assignment of error, and the former rulings of this court, we hold that the refusal to submit the proposed question did not constitute prejudicial error.

Sixth. The sixth assignment of error raises the question whether the court erred in instructing the jury as follows: "You will also consider the reasonable value of the medical services which the plaintiff received."

Plaintiff was a member of a mutual benefit association and received the services of Doctors Lemon and Miller gratuitously. The evidence in the case shows that the only medical services contracted for by the plaintiff were those rendered by Dr. Differt, and the value of his services was properly proven on the trial. There was no evidence introduced as to the value of the services of the other medical practitioners, and the record does not disclose that any claim for such services was made by them. In no event could the plaintiff receive compensation for the services of these two doctors, in view of the fact that they were paid for by the association mentioned. *Gatzweiler v. Milwaukee E. R. & L. Co.* 136 Wis. 34, 116 N. W. 633; *Dillon v. Hunt,* 105 Mo. 154, 163, 16 S. W. 516. Furthermore, the trial court instructed the jury on the subject of damages that they were to name such sum as would compensate the plaintiff, which in plain parlance means a sum that will make him reasonably whole, under all the facts and circumstances in the case. It can-

not consistently be claimed that the jury, under the evidence in this case, either considered or made any allowance for services rendered by these two physicians.

Seventh. A further exception was taken to the charge of the jury on the subject of credibility of witnesses. We have carefully examined the charge of the court in that regard and find no error in the instructions which requires further consideration.

From the foregoing we hold that the judgment of the circuit court must be affirmed.

By the Court.—Judgment affirmed.

BRUST and another, Appellants, vs. FIRST NATIONAL BANK OF STEVENS POINT, Respondent.

December 13, 1921—January 10, 1922.

Venue: Ruling on change of venue not appealable: Civil court of Milwaukee county: New trial after venue changed.

1. An appeal does not lie from an order granting or denying a change of venue.
2. The fact that an order granting defendant's motion for a change of venue, after appeal from a judgment of the civil court of Milwaukee county to the circuit court, included a direction for a trial *de novo* in the circuit court of the county to which the venue was changed, does not make the order appealable, since ch. 261, Laws 1913, provides for a new trial under such circumstances, and such new trial would have followed as of course even if the order had been silent as to that point.

APPEAL from an order of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Dismissed.*

Action begun in the civil court of Milwaukee county against the defendant bank, whose principal place of business is Portage county, Wisconsin. The defendant moved in the civil court for a change of venue to Portage county, but the motion was denied, whereupon it answered and permitted a judgment for $1,834 with interest and costs against

it by default. It appealed to the circuit court and there again moved for a change of venue to Portage county, and from an order changing the venue to such county and providing for a new trial in the circuit court for Portage county the plaintiffs appealed to this court.

For the appellants there was a brief by *Kaumheimer & Kenney* of Milwaukee, and oral argument by *R. I. Kenney.*

For the respondent there was a brief by *Fisher & Cashin* of Stevens Point, attorneys, and *F. F. Wheeler* of Milwaukee, of counsel, and oral argument by *Mr. Wheeler.*

VINJE, J. It is well settled that an appeal does not lie from an order denying or granting a change of venue. *Evans v. Curtiss,* 98 Wis. 97, 73 N. W. 432; *Latimer v. Julius Andrae & Sons Co.* 101 Wis. 311, 77 N. W. 1119; *Waukesha Co. Agr. Soc. v. Wis. Cent. R. Co.* 117 Wis. 539, 94 N. W. 289. But it is argued by plaintiffs that since this order included a direction that there should be a trial *de novo* in the circuit court for Portage county, it was in effect an order granting a new trial and therefore appealable under the decisions of *Pabst B. Co. v. Milwaukee L. Co.* 156 Wis. 615, 146 N. W. 879; *Hanna v. C., M. & St. P. R. Co.* 156 Wis. 626, 146 N. W. 878; *Mechanical A. Co. v. A. Kieckhefer E. Co.* 163 Wis. 647, 159 N. W. 556. The difficulty with this argument is that the legislature and not the court directed the new trial. Ch. 261, Laws 1913, provides that in cases like this, where a defendant is a nonresident of Milwaukee county and a change of venue is granted in the circuit court for Milwaukee county to the county of his residence, "there shall be a trial *de novo* in the same cases and under the same provisions of law as in cases of appeals from justice courts." The new trial in the circuit court for Portage county would have followed as a matter of course if the order had been silent on the question of a new trial. The only matter the circuit court for Milwaukee county considered and judicated upon was whether or not there should be a change of

venue. It was powerless to make any adjudication upon the question of a new trial for the legislature had acted upon that question. The right to a new trial followed as a matter of course upon a change of venue. The order, so far as the court had jurisdiction to act, was an order for a change of venue only, and that, as we have seen, is not appealable. It follows, therefore, that the appeal must be dismissed.

By the Court.—Appeal dismissed.

WATERS and another, Receivers, Respondents, vs. PFISTER & VOGEL LEATHER COMPANY, Appellant.

December 14, 1921—January 10, 1922.

Carriers: Ocean and land carriers: Joint rates: Validity: Undercharges: Liability of consignee for lawful rate.

1. Carriers subject to the Interstate Commerce Act cannot make a joint rate with an ocean carrier, and the transportation within the United States must be treated as a separate transportation, subject to the terms of that act, whether a separate bill of lading was issued or not.
2. Under the Interstate Commerce Act a consignee's acceptance of goods shipped in interstate commerce rendered it liable for the lawful freight charges of the railroad company where the charges prepaid by the ocean carrier were less than the lawful charges. It is the acceptance of the goods, and not the payment of part of the lawful charges, which makes the consignee a party to the contract. *Chicago & N. W. R. Co. v. J. I. Case Plow Works,* 173 Wis. 237, followed.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The defendant accepted delivery of goods transported from New York to Milwaukee, after passage of the Interstate Commerce Act, without paying in full the published tariff for such transportation. It appears that a bill of lading was issued by the Russian East Asiatic Steamship Com-

pany, Limited, at Riga, and immediately indorsed to defendant, and provided that the goods are "Shipped . . . by Ed. R. Lange in and upon the steamship called the Estonia . . . to be delivered from the ship's deck, where the ship's responsibility shall cease, . . . at the port of New York . . . unto order or his or their assigns." "To be forwarded to Milwaukee by all rail at proprietor's risk but ship's expense. Custom-house entry in New York to be paid by consignees."

The bills of lading did not indicate the railroads over which the goods were to be forwarded from New York to Milwaukee and were marked "prepaid," although the freight charges and amount collected are not shown. The defendant made entry of the goods in the custom-house in New York on November 17, 1909, and on that day Benham & Boyeson, general agents of the steamship company, who on May 18, 1909, had obtained an erroneous quotation of the rate from New York to Milwaukee over the lines of the New York Central & Hudson River Railroad Company and connecting carriers, telephoned to the railroad company before forwarding the goods and were informed of the mistake and of the amount of the lawfully published rate for transportation of the goods. At the time the goods were received by the New York Central & Hudson River Railroad Company and later by the Pere Marquette Railroad, its connecting carrier, such roads were informed that the freight had been paid to the Russian East Asiatic Steamship Company, but were not informed as to the amount which had been prepaid and believed that the freight charges from New York to Milwaukee had been reckoned at the correct, published tariff rate, and the goods were delivered to the defendant without demand being made upon it for any freight charges. The amount paid by the steamship company was $1,191.01, computed in accordance with the erroneous quotation. The lawful charge, as provided by the published tariff, was $1,633.45. The steamship company paid to the car-

riers the sum of $1,191.01, and this action was begun to enforce collection of the sum of $442.44 with interest, representing the unpaid balance of the freight. There was judgment for the plaintiff, from which the defendant appeals.

For the appellant the cause was submitted on the brief of *Lines, Spooner & Quarles* of Milwaukee.

For the respondents there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Douglass Van Dyke.*

ROSENBERRY, J. The case was tried upon an agreed statement of facts. There is some dispute as to whether or not the bills of lading issued were through bills. Ed. R. Lange was the agent of the shippers, and the stipulation recites:

"Said Russian East Asiatic Steamship Company, Limited, issued and delivered to said Edward R. Lange two bills of lading for such shipment from Riga, Russia, to Milwaukee, Wisconsin, which were then and there assigned to the defendant, *Pfister & Vogel Leather Company.*"

It does not appear definitely whether, upon the goods reaching New York and being delivered by the steamship company to the connecting carrier, a new bill of lading was issued. Whether a bill of lading was issued or not after delivery to the railroad company, the shipment was subject to the Interstate Commerce Act. Carriers subject to this act cannot make a joint rate with an ocean carrier, and the transportation within the United States must be treated as a separate transportation, subject to the terms of the act. *Pacific Mail S. Co. v. Western Pac. R. Co.* 251 Fed. 218; *J. H. Hamlen & Sons Co. v. Ill. Cent. R. Co.* 212 Fed. 324; *Armour P. Co. v. U. S.* 209 U. S. 56, 28 Sup. Ct. 428.

On behalf of the defendant it is urged here that the consignee can only become liable for the freight by reason of contract, express or implied.

On behalf of the plaintiff it is urged that the Interstate

Commerce Act, as construed by the supreme court of the United States, imposes on the person accepting delivery of interstate shipment the duty of paying the published transportation charges thereon, citing *Pittsburg, C., C. & St. L. R. Co. v. Fink,* 250 U. S. 577, 40 Sup. Ct. 27; *N. Y. Cent. & H. R. R. Co. v. York & Whitney Co.* 256 U. S. 406, 41 Sup. Ct. 509. We are of opinion that upon this proposition the case is ruled by *N. Y. Cent. & H. R. R. Co. v. York & Whitney Co.* In that case the railroad company sued the defendant company to recover the balance claimed for freight and refrigeration on nine carloads of melons, vegetables, and fruit consigned to the latter subject to lawful charges, and delivered at Boston during the years 1911 and 1912. The goods were shipped in interstate commerce upon straight bills of lading approved as to form by the interstate commerce commission, but none of these bills of lading came into the consignee's possession and it had no knowledge of their issuance or terms. The York & Whitney Company accepted the cars, paid the charges claimed, and settled with their customers. Thereafter the railroad company discovered that they had collected a less amount than the lawful rate established and demanded the remainder due them by reason of the undercharges. The demand was refused and the action was begun to enforce payment. The lower court had held that whether or not there was a liability on the part of the York & Whitney Company to pay the rate imposed by law was a question of fact to be determined upon consideration of all the circumstances. The supreme court of the United States said:

"We think the doctrine announced in *Pittsburg, C., C. & St. L. R. Co. v. Fink,* 250 U. S. 577, 40 Sup. Ct. 27, is controlling, and that the liability of York & Whitney Company was a question of law. The transaction between the parties amounted to an assumption by the consignee to pay the only lawful rate it had the right to pay or the carrier the right to charge. The consignee could not escape the liability imposed by law through any contract with the carrier."

It is urged upon us here with great force that these cases

do not lay down the rule that a consignee is liable to pay the freight by reason of a statutory duty, but that the cases tend to establish the proposition that the consignee, having admitted himself to be partially liable, becomes liable for the full amount and not merely the amount of freight erroneously demanded or the amount paid where it was less than the lawful charge. It is not the payment of a part of the amount due that makes the consignee liable. It is the acceptance of the goods. Having made himself liable by the acceptance of the goods, he cannot discharge his liability by the payment of any amount less than the lawful charge. If he cannot relieve himself of liability by the contract with the railway company the converse would seem to be true, that his liability does not arise out of contract, for were the liability merely a contractual liability it might be limited or extinguished by the contract. This court is clearly committed to this theory of the law in *Chicago & N. W. R. Co. v. J. I. Case P. Works,* 173 Wis. 237, 180 N. W. 846. It is there said:

"The right to private contract between shipper and carrier is wholly abrogated by the Interstate Commerce Act, and the rates fixed by law are enforceable by the carrier by force of law."

It is the acceptance of the goods and not a payment of a part of the lawful charges that makes the consignee a party to the contract. Having accepted the goods, and it being undisputed that only a part of the lawful charge has been paid, the defendant thereby became liable for the remainder.

By the Court.—Judgment affirmed.

KAUSCH, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILWAY COMPANY, Appellant.

December 14, 1921—January 10, 1922.

Judgment: Oral: Appeal: Codefendants: Negligence: Reasonable anticipation: Street railways: Starting car while passenger is boarding: Brushing passenger against standing truck: Trial: Special verdict: Form: Instructions: Proximate cause: Contributory negligence.

1. It is not necessary that a judgment of dismissal to which a verdict entitles a defendant be in writing, an oral judgment being sufficient.
2. Plaintiff attempted to board a street car operated by the defendant street railway company, but before he was in the vestibule the car started and carried him against a truck owned by the other defendant which was parked close to the track. Judgment was rendered on a special verdict in plaintiff's favor against the defendant railway company and the record is not clear whether judgment was entered dismissing the other defendant. *Held,* that the rights of the defendant street railway company against its codefendant are not affected by whatever disposition was made of plaintiff's cause of action against such defendant, and on its appeal from the judgment in plaintiff's favor it cannot raise the question.
3. The conductor of the street car, being chargeable with knowledge that plaintiff was not safely aboard the car, should have anticipated that some injury might probably result to him from the sudden starting of the car while he was in the act of boarding it; and legal negligence on the part of the company is sufficiently established though the conductor did not know of the presence of the truck near the track.
4. The presence near the street railway track of the truck, even if it constituted negligence on the part of the owner, was not an intervening cause of the injury but a concurring cause.
5. An instruction as to the burden of proof was unnecessary where the special questions to the jury were so framed that the burden of proof was on the affirmative side in each instance, and the jury were told with reference to each question that, before they could return an affirmative answer, they must be satisfied to a reasonable certainty, by a consideration of all the evidence, that the fact inquired about existed.
6. Refusal to submit to the jury special questions which are immaterial is proper, as is also a refusal to submit a question covering an element included in a question which was submitted.

7. The form of the special question to the jury, "Did plaintiff . . . fail to use ordinary care for his own safety and thereby proximately contribute to produce his injury," without any further indication that a slight want of ordinary care by plaintiff proximately contributing to produce the injury would require an affirmative answer, is sufficient and proper.
8. Error because of the omission of the word "probably" between the words "might" and "produce" in an instruction on proximate cause with reference to plaintiff's contributory negligence, "It must be a cause which the person responsible for it ought reasonably foresee might produce some such result," is prejudicial only to plaintiff and therefore not ground of complaint by defendant.
9. Error in a statement in an instruction on proximate cause with reference to plaintiff's contributory negligence, "It likewise must have been the cause of the result without any other outside cause coming in to interfere and produce the result," was prejudicial to defendant, as its natural import would be to convey the impression that to find contributory negligence the jury must find that the negligence of the plaintiff was the cause of the injury without reference to any other cause.

APPEAL from a judgment of the circuit court for Milwaukee county: A. H. REID, Judge. *Reversed.*

This action was brought to recover damages for personal injuries sustained by the plaintiff while he was attempting to board one of defendant's street cars in the city of Milwaukee. It was commenced in the civil court of Milwaukee county against the defendant railway company. Upon motion of the defendant railway company the Robert A. Johnson Company was made a party defendant, and plaintiff's complaint set forth a cause of action against both companies. Judgment was rendered in the civil court against the railway company for $2,000, but the written judgment made no disposition of the case as to the Robert A. Johnson Company.

The railway company appealed from the judgment so rendered, first to the circuit court and then to this court, where the judgment was reversed and the cause remanded for further proceedings according to law. *Kausch v. C. &*

M. E. R. Co. 173 Wis. 220, 180 N. W. 808. Upon a new trial in the circuit court pursuant to such *remittitur* from this court, a verdict was rendered in favor of the plaintiff and against the railway company for $6,500, which was set aside and a new trial ordered. Upon such new trial the jury returned a special verdict finding that on January 3, 1919, while the plaintiff was in the act of boarding one of defendant's street cars, the car was suddenly moved forward from a state of rest; that such sudden moving of the car constituted an act of negligence on the part of defendant's employees; that such negligence of defendant's employees was the proximate cause of plaintiff's injury; that the plaintiff did not fail to use ordinary care for his own safety; and awarding damages in the sum of $6,000. Upon this verdict judgment was rendered in favor of the plaintiff and against the defendant in the sum of $6,000, from which judgment defendant brings this appeal.

The record discloses that the defendant operates an electric street railway on Grove street, which runs north and south, in the city of Milwaukee; that on the day in question the car stopped just before reaching the intersection of Lincoln avenue for the purpose of taking on passengers; that a truck owned by the Robert A. Johnson Company was parked between the curb and the street-car track, standing at an angle of about forty-five degrees in a northwesterly and southeasterly direction, leaving a space between the motor truck and the body of the street car of about sixteen inches. The front end of the street car had passed the truck, but the rear end had not yet reached the truck. The plaintiff attempted to board the street car, and while he was gripping a tubing in the center of the vestibule, which served as a hand-hold, and had his left foot on the lower step, and before he had gripped the hand-hold with his right hand or placed his right foot on the lower step, the street car was suddenly started, and before he could draw his body into the

vestibule of the car he came into contact with the truck, which brushed him from the car and threw him violently to the ground, inflicting the injuries complained of.

For the appellant there was a brief by *Edgar L. Wood* of Milwaukee, attorney, and *A. L. Gardner* of Chicago, of counsel, and oral argument by *Mr. Wood.*

For the respondent there was a brief by *Ray J. Cannon* of Milwaukee, attorney, and *M. L. Lueck* of Beaver Dam, of counsel, and oral argument by *Mr. Lueck.*

OWEN, J. Before the introduction of any evidence defendant's counsel called the court's attention to the fact that, upon motion of appellant, the Robert A. Johnson Company had been brought in and made a party defendant in the civil court, and asked for a ruling as to whether that company was still a party to the action. While the written judgment made no disposition of the case as to that company, it appeared that the special verdict submitted to the jury at the trial in the civil court contained three questions affecting its liability, all of which were answered against the plaintiff. The attorney for appellant then made a motion after verdict to change those answers, which motion was denied by the trial court, and judgment was rendered upon the verdict in favor of the plaintiff and against appellant. From the judgment so entered the defendant appealed to the circuit court. The circuit court affirmed the judgment of the civil court, which upon appeal was reversed by this court. It seems that the circuit court, in considering the appeal from the civil court, gave no consideration to the judgment as it affected the Robert A. Johnson Company, and no question in that respect was raised when the case was here upon the former appeal. It evidently was assumed by all, in all proceedings prior to the last trial, that the Robert A. Johnson Company had been eliminated from the case. Although the written judgment entered in the civil court makes no disposition of the case as to the Robert A. Johnson Company, it

does appear from the record that the verdict of the jury was such as to entitle it to a judgment of dismissal. It is not necessary that the judgment should be in writing. The oral judgment of the court is sufficient. *Wallis v. First Nat. Bank,* 155 Wis. 533, 145 N. W. 195; *Wehr v. Gimbel Brothers,* 161 Wis. 485, 154 N. W. 972. But whether there was such an oral judgment does not appear from the record before us, so that we are unable to determine whether any judgment was actually entered by the civil court dismissing the action as to the Robert A. Johnson Company. However, this is a question in which the appellant here is not interested. *Bakula v. Schwab,* 167 Wis. 546, 168 N. W. 378. The rights of appellant against the Robert A. Johnson Company are not affected by the disposition which the trial court made of plaintiff's cause of action against that company, and it is in no position to raise the question. *Ibid.* That is a question in which the plaintiff only is interested, and he seems to have abandoned the action as to the defendant Robert A. Johnson Company, if in fact no more effectual disposition has been made thereof.

The defendant contends that judgment should have been directed in its favor because it was guilty of no negligence. The jury found upon sufficient evidence that the defendant's car suddenly moved forward from a state of rest while the plaintiff was in the act of boarding the car. Appellant argues that it was not the sudden starting of the car that caused the injury, but the proximity of the truck parked in the street, of which the conductor had no knowledge, and that, having no knowledge of the dangerous presence of the truck, he cannot be held to have anticipated that this accident might probably happen by reason of the starting of the car before plaintiff was safely aboard. It is likely true that the conductor did not know that the truck was in the street, and that he cannot be held to have reasonably anticipated that the plaintiff would suffer the particular accident and injury. But it is not necessary that he should anticipate a

specific injury. It is sufficient that he should reasonably have anticipated that some injury might probably result. *Coel v. Green Bay T. Co.* 147 Wis. 229, 238, 133 N. W. 23. The conductor was chargeable with knowledge that plaintiff was not safely aboard the car, and he should have anticipated that some injury might probably result to the plaintiff from the sudden starting of the car while plaintiff was in the act of boarding the same. This is sufficient to establish legal negligence on the part of the defendant.

Nor can it be held, as argued by appellant, that the presence of the truck in the street was an intervening cause of the injury. It was rather a concurring cause. Even though the presence of the truck constituted negligence on the part of the owner, the injury would not have occurred had the conductor refrained from starting the car until the plaintiff was safely aboard.

Error is assigned because the court did not charge the jury with reference to the burden of proof. The questions were so framed that the burden of proof was on the affirmative side in each instance. With reference to each question the jury were told that before they could return an affirmative answer they must be satisfied to a reasonable certainty by a consideration of all the evidence that the fact inquired about existed. If not so satisfied, they were directed to answer the question "No." This most effectually placed the burden of proof upon the party required to prove the affirmative of each question propounded, and made a charge with reference to the burden of proof unnecessary. The trial judge, in his opinion upon the motions after verdict, stated that this was his uniform practice, and expressed the opinion that it was a better and safer practice than to attempt to define the terms "burden of proof" and "preponderance of evidence." It appears to be a simple and effective way of impressing upon the jury the rule which should govern them in arriving at their determination, and rendered an instruction with reference to the burden of proof unnecessary.

Appellant assigns as error the refusal of the court to include in the special verdict questions calculated to elicit findings as to whether the conductor knew the truck was parked in the street close to defendant's track, and whether the plaintiff in the exercise of ordinary care would have safely boarded the defendant's car had he not come in contact with the truck. These questions were immaterial, unless the presence of the truck constituted an intervening cause, which we have negatived.

Complaint is also made because the court refused to include in the special verdict the question of whether there was a want of ordinary care on the part of the conductor in giving the signal to start the car while the plaintiff was standing on the car step and holding onto the car with his hand. This element was included in the question submitted relating to defendant's negligence, with the instructions thereon, and its submission was not only unnecessary, but would have been improper, in view of the question submitted, by which it was determined that the sudden moving of the car constituted an act of negligence on the part of defendant's employees.

The question of contributory negligence was submitted in this form: "Did the plaintiff at said time fail to use ordinary care for his own safety and thereby proximately contribute to produce his injury?" The appellant complains of the form of this question for the reason that neither the question nor the court's instruction thereon indicated to the jury that they should answer the question "Yes" if they found that a slight want of ordinary care on the part of the plaintiff proximately contributed to produce the injury. It is true that neither the question nor the instruction advised the jury that they should answer the question "Yes" if they found that a slight want of ordinary care on the part of the plaintiff proximately contributed to produce the injury, but it did require them to find whether any want of ordinary care on the part of the plaintiff proximately contributed to the injury. Certainly any want of ordinary care includes slight

want of ordinary care, and the jury must have understood that if the plaintiff was guilty of any want of ordinary care, no matter how slight, which proximately contributed to the injury, they were required to answer the question "Yes." While it has been held proper to charge the jury that any want of ordinary care, no matter how slight, which proximately contributes to the injury is sufficient to find the plaintiff guilty of contributory negligence, it can have no other purpose than to emphasize that which is comprehended in the expression "any want of ordinary care." While this emphasizing phrase is usually indulged in connection with contributory negligence, it may, with the same propriety, be used in connection with the defendant's negligence. In fact, judicial impartiality between the parties would seem to require that it be used with reference to the negligence of both parties or not at all. To submit a case in any form which calls upon the jury to find whether the plaintiff is guilty of a slight want of ordinary care, while calling upon them to find whether the defendant is guilty only of a want of ordinary care, is apt to give rise to the impression in the minds of the jury that there are classifications of ordinary care. This is not the case. In *Astin v. C., M. & St. P. R. Co.* 143 Wis. 477, 484, 128 N. W. 265, it was said "that there are no sub-degrees within the major degrees of negligence, known in our law." This means that there are no classifications or subdivisions of want of ordinary care. Any want of ordinary care on the part of the plaintiff which proximately contributes to his injury constitutes contributory negligence. Likewise any want of ordinary care on the part of the defendant which is the proximate cause of the injury constitutes negligence on the part of the defendant. This is the rationale of the discussion of contributory negligence to be found in *Dreher v. Fitchburg,* 22 Wis. 675; *Ward v. M. & St. P. R. Co.* 29 Wis. 144; and *Bloor v. Delafield,* 69 Wis. 273, 34 N. W. 115, where the doctrine is firmly established in the jurisprudence of this state that it is not slight negli-

gence but any want of ordinary care on the part of the plaintiff proximately contributing to his injury that bars a recovery. Sec. 1809, Stats., providing that slight want of ordinary care on the part of the plaintiff shall not prevent a recovery for injuries sustained at railroad crossings under certain circumstances, possibly introduces an exception to the general rule above stated, but has no bearing upon the question we are discussing.

In submitting question 3 of the special verdict, inquiring whether the negligence of the defendant constituted the proximate cause of plaintiff's injury, the term "proximate cause" was defined in accordance with the decisions of this court. The definition, however, was not repeated in submitting the question relating to contributory negligence. That the jury had some difficulty in understanding their duty with reference to that question is evidenced by the fact that on two different occasions they called upon the court for further instructions with reference thereto. During the colloquy between the jury and the court the trial judge said:

"Now a cause in order to be a proximate cause must first of all be a real, acting cause, one that takes effect, that is the first thing; it likewise must have been the cause of the result without any outside cause coming in to interfere and produce the result; then, third, it must be a cause which the person responsible for it ought reasonably to foresee might produce some such result."

The last sentence above quoted is assigned as error because it is contended that to be a proximate cause "it must be a cause which the person responsible for it ought reasonably to foresee might *probably* produce some such result." It is true that a correct statement of the rule requires the word "probably" to occur between the words "might" and "produce." *Meyer v. Milwaukee E. R. & L. Co.* 116 Wis. 336, 340, 93 N. W. 6; *Feldschneider v. C., M. & St. P. R. Co.* 122 Wis. 423, 99 N. W. 1034. But by the omission of that word, under the circumstances, the appellant was not prejudiced. This statement was made by the court with

reference to plaintiff's contributory negligence, and permitted the jury to find him guilty of contributory negligence if he ought reasonably to have foreseen that his conduct might produce some such result, even though it might not "probably" produce such result. The error really gave the jury too broad rather than too narrow a latitude in construing plaintiff's conduct as contributory negligence, and was error prejudicial only to the plaintiff.

We are given more trouble, however, by the following phrase in the above quoted instruction, namely: "It likewise must have been the cause of the result without any other outside cause coming in to interfere and produce the result." This is not a correct statement. It is not necessary that a proximate cause should be the cause of the result without any other outside cause coming in to interfere and produce the result. This would preclude the possibility of fixing a proximate cause where two acts of negligence concur to produce an injury. It not infrequently happens that injury results from two independent negligent acts but for either of which the injury would not occur. Under such circumstances it is held that either wrong-doer whose negligent act concurs to produce the injury is liable therefor. *Mehegan v. Faber,* 158 Wis. 645, 149 N. W. 397; *Pennell v. Rumely P. Co.* 159 Wis. 195, 149 N. W. 769; *Ellis v. C. & N. W. R. Co.* 167 Wis. 392, 167 N. W. 1048. Under such circumstances the negligent act of each wrong-doer constitutes a proximate cause. If it were true that the "proximate cause must be the cause of the result without any other outside cause coming in to interfere and produce the result," then under such circumstances the negligent act of neither wrong-doer constitutes a proximate cause. The language quoted was addressed to the jury in connection with the question relating to plaintiff's contributory negligence, and its natural import, as so used, was to convey the impression that in order to find the plaintiff guilty of negligence which proximately contributed to the injury it was necessary to

find that his negligence was the cause of the injury without reference to any other cause, and would exclude the negligence of the defendant itself, and, having already found the defendant negligent, they could not also find the plaintiff negligent. We think the use of this language, under the circumstances, was clearly error, for which the judgment must be reversed.

Complaint is also made because the damages are excessive and because the court authorized the jury to include in the damages reasonable compensation for future loss of earnings, pain and suffering proximately resulting from the injury. In view of the fact that there must be a new trial, it is unnecessary to discuss at length the questions thus raised, and we will do no more than say that the evidence justified the assessment of future damages, although we think the amount of damages assessed is exceedingly liberal, and we would be much better satisfied with a considerably smaller amount. It is not necessary for us to determine whether they are excessive.

By the Court.—Judgment reversed, and cause remanded for a new trial.

STATE EX REL. HOULAHAN, by guardian *ad litem*, Appellant, vs. BOARD OF TRUSTEES OF THE FIREMEN'S PENSION FUND OF THE CITY OF MILWAUKEE and others, Respondents.

December 14, 1921—January 10, 1922.

Municipal corporations: Pension funds for firemen: "Dependent daughter."

Under secs. 9 and 10, ch. 87, Laws 1907, relative to a pension fund created for firemen of the city of Milwaukee, a daughter of a deceased member who is a normal, healthy child over the age of eighteen years is not a "dependent daughter" within the statute nor entitled to a pension, although her mother is dead and she has no property of her own.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of defendants ordering that an alternative writ of *mandamus* issued in favor of petitioner be quashed.

The petition alleged that on March 24, 1911, *Loretta Houlahan,* by the death of her father in line of duty, became a beneficiary of a pension fund created for members of the fire department of the city of Milwaukee pursuant to ch. 87, Laws 1907; that thereafter said *Loretta Houlahan* was classified by the board of trustees as a "minor child" and received a benefit of $40 per month until October 14, 1919, her eighteenth birthday; that she should have been classified as a "dependent daughter," and should continue to receive the benefit; and that the board of trustees had refused to change the classification on the ground that they could not review the action of a former board.

The petition further set out that *Loretta Houlahan* was ten years old at the time of her father's death; that her mother had died several years previous; that the father's estate did not exceed $2,500; and prayed that the board of trustees be required to classify the petitioner as a "dependent daughter."

Ch. 87, Laws 1907, reads as follows, in part:

"Sec. 9. If any member of such fire department while contributing to such fund, shall, while engaged in the performance of his duties, be killed, . . . and shall leave a widow or minor child or children under eighteen years of age, or if there be no widow and there shall be any minor child or children or dependent daughter, or being unmarried shall leave a dependent father or mother, the said board shall direct the payment from said pension fund of the following sums monthly, to wit: to the widow . . . to the guardian of such minor child or children while widow is living, six dollars for each child until it reaches the age of eighteen years; to the guardian of such minor child or children where there is no widow surviving or where the widow dies before such child reaches the age of eighteen years the

amount the widow would have been entitled to until such child reaches the age of eighteen years; to the dependent daughter, father or mother, in case where there is no widow (but in any case only to one of them) the amount a widow would be entitled to in the particular case."

"Sec. 10. . . . No person shall be entitled to receive any benefit from any such fund other than that prescribed by this act and in no event shall any allowance be paid to any widow or daughter who marries after the death of the member through whom she is entitled to a pension, nor to any minor child after it attains the age of eighteen years, nor to any dependent daughter, mother or father except during such time as she or he shall continue to be dependent."

This statute, previous to 1907, included no beneficiary classed as a "dependent daughter."

The writ was quashed upon motion of defendants.

James D. Foley of Milwaukee, for the appellant.

For the respondents there was a brief by *Clifton Williams,* city attorney, and *John M. Niven,* first assistant city attorney, and oral argument by *Mr. Niven.*

JONES, J. It will be seen that by the statute of 1907 there is added to the list of those who may receive the benefits of the pension fund a beneficiary designated as a "dependent daughter." The problem presented is whether under this statute a normal, healthy child, a daughter, being a minor, is a dependent and entitled to a pension after reaching the age of eighteen years.

It is claimed by appellant's counsel that the amendment of 1907 adding the words "dependent daughter" includes all situations where there is left surviving by a deceased member of the fire department a dependent daughter irrespective of her age. On the other hand, it is urged by respondents' counsel that the amendment created an entirely new and distinct class of beneficiaries for which previously no provision had been made; and this was the view adopted by the trial court.

In one sense any child of tender years is a dependent. If the deceased member of the department had left a son ten years of age or younger, he would have been like a daughter, dependent, but it must be conceded that he could not have been classified as a dependent under the statute, and it is difficult to perceive why the legislature should have singled out the daughter as entitled to a dependent's pension merely on the ground of minority and denied the privilege to the son equally needing it.

It seems to us the more reasonable explanation of the legislative meaning that it was intended to confer the pension upon a new class of beneficiaries. If a daughter over eighteen years of age, dependent by reason of some physical disability, should survive her father and her mother, there would be good reason for extending to her the same benefit which a dependent father or mother received under the statute.

The argument that mere minority and lack of property allowed the daughter to be classified as a dependent entitled to the pension indefinitely until her marriage or so long as dependency might continue seems to us inconsistent with the other language in the statute, "In no event shall any allowance be paid to any . . . minor child after it attains the age of eighteen years." If the legislature had the intention to continue the pension beyond the age of eighteen and until dependency ceased, the addition to the clause above quoted, as suggested by respondents' counsel, of the following words, "unless such child is a dependent daughter," would have made the meaning perfectly clear. The omission of any such language and the command that no allowance be paid to any minor child after the age of eighteen seem to lead to the conclusion that the petitioner was not in the class entitled to a dependent's pension.

It is claimed by respondents' counsel that the statute would include as a dependent a daughter who had taken the

mother's place as the head of the household, thus devoting herself to the interests of the family and depriving herself of the opportunity to learn how to earn her own living, and perhaps giving up her chances of marriage. But it is not necessary to decide this question. In some respects the meaning of the statute is not clear. We confine our decision to the facts of the present case, and hold that the mere fact that the claimant was a minor without property did not entitle her to be classified as a dependent daughter.

By the Court.—Judgment affirmed.

WORTHINGTON PUMP & MACHINERY CORPORATION, Appellant, vs. NORTHWESTERN IRON COMPANY, Respondent.

December 14, 1921—January 10, 1922.

Inspection of instruments: Materiality of writings sought to be inspected: Control of adverse party: Showing of materiality.

1. To entitle a party to an inspection or production of writings under sec. 4183, Stats., they must be in the possession or control of the adverse party; and if it clearly appears that all the correspondence material to the inquiry was produced the objects of the statute are fully met, and an order for inspection and production will not be granted.
2. It is essential to the right of inspection that the production or inspection sought is material to the issues involved and affects the merits of the action, but a general allegation of materiality and necessity is insufficient, as facts must be stated showing how and why the discovery or inspection is material; and an order therefor will be denied where the application appears to be made solely for fishing purposes.
3. In an action for damages for the wrongful cancellation of a contract and refusal to deliver a portion of the goods, where defendant's secretary, under adverse examination pursuant to sec. 4096, Stats., produced a written memorandum and correspondence showing that plaintiff had requested a cancellation, to which defendant expressed its willingness on the payment of certain sums by way of adjustment, but that such

offer was never accepted and no agreement as to adjustment ever arrived at, and that defendant's cancellation was not based on such negotiations, such ineffectual attempts at cancellation were immaterial and need not be considered on plaintiff's petition for inspection or production of correspondence passing between defendant and its agent, with whom all of plaintiff's communications were had.

4. Where it appeared from the adverse examination of defendant and from his testimony at the hearing on the petition for inspection, together with that of defendant's counsel, that neither had possession of any correspondence not already produced with reference to such cancellation, and plaintiff, whose allegations and supporting affidavit of counsel were based on information and belief only, could not specify any particular correspondence, the court did not abuse its discretion, under sec. 4183, Stats., in denying plaintiff's petition for inspection.

5. Nor did the court abuse its discretion in refusing to grant an inspection of letters between defendant and its agent as to an alleged agreement to withhold shipments, where no such letters were in fact shown to exist and the materiality thereof, if any, was not shown.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal by the plaintiff from an order entered on June 4, 1921, denying the petition of the plaintiff for an inspection and permission to take copies of letters, telegrams, memoranda, books, papers, and other records passing between the defendant and Pickands, Brown & Company, its agent.

The complaint, among other things, alleges that on August 5, 1918, the plaintiff and defendant entered into a contract by the terms of which the defendant agreed to sell and the plaintiff agreed to purchase 3,000 tons of pig iron, to be delivered in equal monthly quantities from January to June, 1919, at the price of $33 per ton, but with a provision that the price to be paid by the plaintiff "shall be the price fixed for that time by the proper United States government agency, by agreement or otherwise, as the public or market

price for such material, instead of the price herein named; provided, however, that should the government discontinue regulation of prices, then the last price determined by the government shall be that at which any undelivered tonnage on this contract shall be shipped and paid for." A second contract for the purchase and sale of 4,000 tons of pig iron, to be delivered in equal monthly instalments from July to December, 1919, was also entered into, with terms similar otherwise to those contained in the first contract; that subsequent to the entering into of said contracts and in conformity with an agreement reached between the industrial board of the Department of Commerce and the general steel committee of the Iron and Steel Institute, the defendant reduced the price of the undelivered portion of the iron mentioned in the contracts to $26.75 per ton, which price was to take effect on shipments on and after March 21, 1919, and to continue until the defendant advised the plaintiff to the contrary; that the plaintiff accepted such reduction, and that the plaintiff received no notice from the defendant to the contrary, and the government did not thereafter fix or determine the price of iron, and that the price of the undelivered portion of the iron thereafter continued, by agreement between the parties, to be $26.75 per ton; that on May 23, 1919, there were 1,034 tons undelivered on the first contract and no deliveries had been made on the second contract; that on the 23d day of May, 1919, the defendant agreed to defer shipping the balance of said iron and to make no further shipments thereof without consulting the plaintiff with reference thereto; that on the 8th day of December, 1919, the defendant, in violation of the said contracts and agreement, canceled said contracts and refused to deliver the portion of the iron undelivered, and that by reason of such refusal the plaintiff has sustained damages in a large sum of money.

In its answer the defendant admits entering into the con-

tracts referred to in the complaint. The answer further alleges that after the armistice in 1918 there was a decreased demand for pig iron and a decline in the market, and that the defendant, on or about January 18, 1919, voluntarily reduced the price on all shipments of iron under the contracts to $31 per ton, in so far as the iron was to be used by the plaintiff for work taken by the plaintiff after the armistice, and that on or about March 26, 1919, on all shipments made on and after March 21, 1919, under said contracts the defendant would until further notice charge plaintiff $26.75 per ton, f. o. b. cars at the furnace; that the defendant, however, did not agree to reduce the contract price on any of the tonnage which then remained to be delivered under said contracts to the sum of $26.75 per ton or to any sum below what the contract price then was, except as such tonnage should be actually shipped under said contracts or either of them, and no other or further notice should be given in connection with such future shipments; that there was no other change whatever in any of the terms or conditions of said contracts.

The answer further alleges that on May 16, 1919, and on a number of other dates between said time and the 15th day of August, 1919, the plaintiff requested the defendant to defer shipments of iron until further advised. The defendant expressly denies that it ever agreed to make no further shipments under said contracts without consulting the plaintiff with reference thereto, and alleges that the obligation of the plaintiff to accept deliveries of iron continued in force at all times without change, and that the defendant, after numerous efforts to deliver the balance of the iron, which efforts were frustrated by the plaintiff, on or about the 6th day of December, 1919, notified the plaintiff that it had elected to cancel said contracts as to all tonnage undelivered thereunder; that the basis of the cancellation of said contracts was the repeated and long-continued default of the plaintiff under both of said contracts.

Both counsel concede that the issues presented by the pleadings are the following:

1. Whether the defendant was justified in canceling the contracts as to the tonnage which remained undelivered after May 16, 1919, because of the continued refusal of the plaintiff to authorize it to resume deliveries after they had been temporarily suspended on that date, at plaintiff's request; and

2. As bearing on the measure of damages, whether the contract price as to the tonnage which remained undelivered was reduced to $26.75 per ton.

It is conceded that Pickands, Brown & Company of Chicago, a corporation, was the general agent of the defendant, and that the contracts of the parties were negotiated between the plaintiff and such agent, and all negotiations, correspondence, and communications had with respect to said contracts, or the execution or cancellation thereof, were had between the plaintiff and such agent; and that no negotiations were had or communications passed at any time between the plaintiff and the defendant, and that all acts of said agent performed in the premises were duly authorized by the defendant. Pickands, Brown & Company hereafter will be referred to as "agent."

After issue joined, the plaintiff took the depositions, under sec. 4096 of the Statutes, of Wilmot Saeger, secretary of the defendant, and of Robert S. Dutton, Seymour Wheeler, and Robert J. Krogman, respectively assistant secretary, vice-president, and employee of the agent. On such adverse examination all of the correspondence passing between the plaintiff and the agent relative to the matters in issue was produced. Thereupon the plaintiff filed its petition under and pursuant to the provisions of sec. 4183 of the Statutes, praying for an inspection of the original or copies of all letters, telegrams, memoranda, books, papers, and records passing between the defendant and the agent, or the agent and the defendant, between August 5, 1918, and De-

cember 28, 1919, which in any way related to or were connected with the reduction of the price of the iron under said contracts, or either of them, from $33 per ton to $31 per ton; the cancellation of said contracts, or either of them, on the basis of the plaintiff paying the defendant $7.50 per ton, and also relative to the cancellation on the basis of $6 per ton; also relating to the reduction of the price of iron under said contracts to $26.75 per ton; also relating to the withholding of shipments under said contracts or either of them; relating also to the request of the plaintiff to accept deliveries under said contracts, or either of them, subsequent to the 16th day of May, 1919; and relating to the amount of iron still due the plaintiff under said contracts or either of them, and relating to the reason for the cancellation of said contracts or either of them. The petition also alleged, on information and belief, that these documents were in the possession or under the control of the defendant and that they were necessary to enable the plaintiff to prepare its case for trial.

This petition was also supported by the affidavit of one George B. Hudnall, plaintiff's attorney, which among other things set forth and referred to the material portions of the pleadings of the parties, the correspondence which passed between the plaintiff and the agent, and the material portions of the adverse examinations under sec. 4096 of the Statutes, above referred to. These statements will be referred to in detail only as they may appear necessary in the opinion following.

For the defendant an affidavit was made and filed by Charles F. Fawsett, its attorney, and an affidavit of Wilmot Saeger, secretary of the defendant, and a statement made in open court by said Fawsett at the time of the hearing of the petition for an order for inspection. The material portions of the statement and affidavit of defendant's counsel and of its secretary will also be referred to hereafter in the opinion.

The circuit court thereupon entered an order denying the petition, with costs, and from such order so made plaintiff appeals.

For the appellant there were briefs by *Bottum, Hudnall, Lecher & McNamara* of Milwaukee, and oral argument by *George B. Hudnall.*

For the respondent there was a brief by *Fawsett & Smart,* and oral argument by *Charles E. Monroe,* all of Milwaukee.

DOERFLER, J. The writings and correspondence requested may be grouped as follows: (1) Those pertaining to the attempted cancellation of the contracts in December, 1918, and the early part of 1919; (2) the cancellation of the contracts by the defendant in December, 1919; (3) those relating to the reduction of the price of the undelivered tonnage to $26.75 per ton; and (4) as to the withholding of shipments after May 19, 1919.

To entitle a party to an inspection or production of such writings it is necessary that they should be in the possession or control of the adverse party. 6 Ency. Pl. & Pr. 794, and cases cited in note.

If, therefore, it appears clearly that all of the correspondence material to the inquiry was produced, the objects to be accomplished by the statute are fully met. It is also indispensably essential to this right that the production or inspection sought is material to the issues involved and that it affects the merits of the action. 6 Ency. Pl. & Pr. 795. A general allegation of materiality and necessity is not sufficient, but facts must be stated showing how and why the discovery or inspection is material. 6 Ency. Pl. & Pr. 804, 805. An order for production or inspection will be denied where the application appears to be made solely for fishing purposes. 6 Ency. Pl. & Pr. 792, and cases cited in note 2.

We will first consider the attempted cancellation of the contracts in December, 1918, and the early part of 1919.

Saeger, the secretary of the defendant, while under adverse examination produced what purported to be the written memorandum and the correspondence upon that subject, and it appears conclusively from such data that early in December, 1918, the plaintiff requested a cancellation of the contracts, and that some correspondence was had between the agent and the defendant pursuant to the said request; that the defendant wrote its agent and expressed its willingness to cancel the contracts upon the payment of the sum of $7.50 per ton by way of adjustment. This offer of the defendant was communicated by its agent to plaintiff, but was never accepted or acted upon. It also appears clearly from the adverse examination of Mr. Saeger that no agreement between the parties as to an adjustment was ever arrived at, and he further testified that when the contracts were canceled by the defendant on December 6, 1919, it was not based on the negotiations, started early in the year, which provided for an adjustment of $7.50 per ton upon the undelivered portion of the iron under the contracts. Under the evidence referred to, the ineffectual attempts at cancellation early in the year 1919 can have no bearing or materiality as to the issues involved in the action and need not be further considered here.

We will now take up the letters, etc., above referred to under headings 2 and 3, namely, the cancellation of the contracts by the defendant in December, 1919, and the reduction of the price of the undelivered tonnage to $26.75 per ton.

Saeger, secretary of the defendant, made and filed herein an affidavit which among other things avers the following:

"That at or about the time of the commencement of the above entitled action this defendant caused a thorough and careful search to be made by its agents, Pickands, Brown & Company, for all papers and correspondence in the possession or under the control of its said agents in any way relating to the transactions referred to in said action, and all of

such papers and correspondence to be turned over to it, the defendant, for consideration in connection with the controversy out of which said action arose, and thereafter all of such papers and correspondence, including all papers and correspondence in the possession of the defendant itself, in any way relating to said action or to the transactions referred to in the complaint were turned over by the defendant to Charles F. Fawsett, as its attorney, and ever since have been in the possession of said attorney, subject at all times to the inspection and examination of the defendant;" that since the commencement of the proceeding by the plaintiff to obtain an inspection of correspondence which passed between the defendant and its said agents, in respect to transactions referred to in said action, and since the proceedings for the examination of this affiant by the plaintiff as the secretary of the defendant under sec. 4096 of the Statutes, and in connection therewith this affiant has carefully gone through and examined all of said papers and correspondence and says that all of the letters, telegrams, memoranda, or any communications whatever in writing passing between the defendant and said Pickands, Brown & Company between the 5th day of August, 1918, and the 28th day of December, 1919, in any way relating to or connected with the cancellation of the contracts referred to in the complaint, or either of them, on the basis of the plaintiff paying the defendant $7.50 per ton, and also relative to the cancellation of said contracts, or either of them, on the basis of $6 per ton, or relating to the reduction of the price of iron under said contracts, or either of them, to $26.75 per ton, which this affiant was able to find or has since been able to find, were produced by this affiant upon his examination under sec. 4096 . . . and are as shown in the record of said examination on file in this action. That a thorough search has been made for all such correspondence or papers, and this affiant verily believes that said correspondence and papers so produced upon said examination are all of such papers and correspondence in any way relating to said subjects."

Subsequent to the adverse examination of Saeger, referred to under heading 1, and in reply to a question of the witness by plaintiff's counsel, Mr. Fawsett, defendant's counsel, who concededly was in possession of all of the

correspondence between the defendant and its agent, made this statement: "We don't find any more correspondence on the subject of canceling, passing between the *Northwestern Iron Company* and Pickands, Brown & Company." The examination of Mr. Saeger was thereupon abandoned upon the subject of cancellation.

Seymour Wheeler, the vice-president and treasurer of the agent, testified that he wrote a letter of date of December 8, 1919, to the plaintiff, in which the plaintiff was advised of the cancellation of the contracts as to the tonnage undelivered under them. In the adverse examination he stated that he wrote this letter under the instructions of the defendant, but did not remember when he had received the instructions, or who had given him the same, or whether they were in writing or oral. On the same examination he was also referred to a letter of date of December 27, 1919, signed by himself as treasurer of the agent, and with respect to this letter the witness testified that he wrote the letter under instructions from the defendant, but that he did not know whether the request was in writing or oral, or which officer of the defendant requested the witness to write such a letter.

Mr. Fawsett, defendant's counsel, at the close of the argument in the circuit court, presented this statement, in open court, which the court stated it would receive to the same effect as though it were verified:

"The letters, Exhibit A, attached to my affidavit filed in this proceeding, being letters dated December 8, 1919, December 27, 1919, and January 9, 1920, in relation to the reasons for the cancellation of the contract involved in this case, are substantially at least, if not wholly, copies of letters which, after examination of the facts in this case, all correspondence, consultation of my clients, I dictated, submitted to them, and which they in turn forwarded to their agents, Pickands, Brown & Company, to be signed and sent to the *Worthington Pump & Machinery Corporation.*"

The letter in the statement of Mr. Fawsett of date of

January 9, 1920, is a reply by the agent to a letter received from the plaintiff dated January 5, 1920, and in which letter the agent reiterates the statements made in its letter of December 27, 1919.

The witness Saeger, on his adverse examination, was asked to produce all of the correspondence passing between the defendant and the agent relative to the reduction of the price mentioned in the contracts to $26.75, and Mr. Fawsett then made the statement that he could not find any such correspondence in his files, and prior to a recess the commissioner directed the witness to make a search of the correspondence and then to report the results, and witness was then asked this question: "*Q.* Did you find any of the letters I mentioned about before dinner? *A.* No, I did not."

Now it must be borne in mind that before the close of the hearing in the court below, the defendant's counsel, who concededly had all the correspondence existing in his possession, made a complete statement as to the writing of the letters pertaining to the final cancellation on the part of the defendant of the contracts, that these letters were written by him, delivered to the defendant, and by it transmitted to the agent, who thereupon either forwarded them or sent copies thereof to the plaintiff.

In connection with the reduction of the price of the iron to $26.75, it will appear from the foregoing that not only did defendant's counsel expressly disavow having in his possession any other correspondence on that subject outside of what had already been produced, but Mr. Saeger, the secretary of the defendant, after an examination of the correspondence subsequent to a recess, stated that he found no other correspondence upon the subject. In this connection there must also be taken into consideration the affidavit of Saeger, above referred to, in which he, in substance, states that all of the correspondence between the defendant and its agent was submitted upon the adverse examination and is a part of the record, and that he had made and caused

to be made a thorough search for such correspondence. Bearing in mind, also, that plaintiff could not specify any particular correspondence passing between the defendant and its agents, and that the allegations of the petitioner and the affidavit of its counsel are and were necessarily based upon information and belief, we are of the opinion that, in view of the discretionary power vested in the court under sec. 4183 of the Statutes, the lower court was not guilty of an abuse of such powers in making the order complained of. *Schlesinger v. Ellinger,* 134 Wis. 397, 401, 114 N. W. 825; *Hoyt v. American Exch. Bank,* 1 Duer, 652.

While it must be conceded that sec. 4183 is a remedial statute and should be construed liberally, and while the statute in part is designed to take the place of the old discovery statute and is treated by the authorities and textwriters under the head of "Discovery," nevertheless it is plain that in its application it is not as broad and extensive as sec. 4096, under and by which a broader and more comprehensive field is contemplated for search and investigation.

As to the withholding of shipments after May 19, 1919, constituting the fourth heading above referred to, the plaintiff examined one Robert J. Krogman, an employee of the agent in its order department, and in the course of the adverse examination the witness' attention was called to a number of letters received by the agent from the plaintiff pertaining to plaintiff's requests to withhold shipments of iron from time to time. The witness testified that he communicated with the defendant on the subject of plaintiff's request to defer shipments, and also testified as to instructions received by the defendant in regard to plaintiff's request, but that he could not recall who gave him the instructions, or who instructed him to communicate with the defendant, or as to whether the instructions received by him were oral or in writing.

Plaintiff's counsel thereupon demanded a submission to

him, for the purposes of the inquiry, of all letters passing between the agent and the defendant upon the subject, to which request defendant's counsel refused to accede, upon the ground that no showing had been made warranting the submission of any such correspondence and because such correspondence was immaterial.

In considering this heading we must also bear in mind the affidavit of Mr. Saeger heretofore referred to. The trouble with the inquiry of plaintiff's counsel on this branch of the subject, in part, is that he did not establish the fact that there was any communication in writing between the defendant and its agent or *vice versa*. It was conceded that the entire transaction involved was between the plaintiff and the agent and that no part of the transaction took place between the plaintiff and the defendant. All of the acts of the agent being concededly authorized, anything that the agent did in the premises was equivalent in all respects and in legal effect to an act of the defendant itself. In other words, in legal contemplation the defendant and its agent were one, and the advice, if any, oral or in writing, given by the principal to its agent, or the communications of the agent to the principal, were to all legal and practical purposes the same as though they constituted an unexpressed mental conclusion of the defendant itself. The materiality of this correspondence, etc., is, to say the least, doubtful. We will, however, not determine this matter upon this basis, in order not to foreclose the plaintiff from making a proper showing upon the trial with respect to the materiality. The record does not disclose that the materiality of this correspondence, etc., was brought home to the commissioner or to the court.

From what has been said, we are of the opinion that the circuit court was justified, in the exercise of its discretionary powers vested in it by the provisions of the statute, in refusing to order the inspection requested.

By the Court.—Order affirmed.

SCHUIER, Respondent, vs. KUSWA and others, Appellants.

December 14, 1921—January 10, 1922.

Execution against the body: Payment of board: Jail limits: Bond.

1. The provision of sec. 4320, Stats., that a creditor must advance payment for the board of a prisoner held on body execution during the time for which he may be imprisoned, and that the failure to make such advance payment shall discharge the prisoner, was intended to protect the public against the expense of boarding him, and does not apply where the public is otherwise protected, as where the prisoner is allowed jail limits on bond.
2. A prisoner on a tort judgment who gives bail and is out on jail limits relieves the judgment creditor from the prepayment of board from the time the prisoner leaves the jail.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Action begun in the civil court of Milwaukee county upon a bond of $300 assigned by the sheriff to plaintiff and conditioned that one *Kuswa,* against whom plaintiff held a tort judgment for $190.91, wholly unsatisfied, should remain a true and faithful prisoner and not escape or go beyond the jail limits of Milwaukee county, unless discharged by due course of law.

Plaintiff at the time she caused the arrest of *Kuswa* upon the tort judgment deposited with the sheriff $5 to pay for his board at the rate of sixty cents per day, that being the lawful charge. *Kuswa* remained in jail two days and then gave the bond sued upon. He remained for ten days within the jail limits and then returned to his home outside the jail limits and has there remained. The sheriff, while the bond was in full force and effect, returned to plaintiff $3.80 of the $5 advanced as unexpended board money.

The civil court held that *Kuswa* was by force of sec. 4320, Stats. 1919, discharged by due course of law at the expiration of the ten days and rendered judgment for the defendants. The circuit court reversed such judgment and entered

judgment for plaintiff for the amount due upon her judgment, with interest. The defendants appealed.

The cause was submitted for the appellants on the brief of *H. L. Eaton* of Milwaukee, and for the respondent on that of *Lorenz & Lorenz* of Milwaukee.

VINJE, J. The body execution upon which defendant was detained in custody directed the sheriff "to commit him to the common jail of your county until he shall pay the said judgment [theretofore described] or be thence discharged according to law." It will thus be seen that the execution did not provide for an imprisonment for a specified number of days. But it is contended by defendants that since only $5 was paid for *Kuswa's* board by plaintiff, and board was at the rate of sixty cents per day, the sum paid was exhausted, and by virtue of the provisions of sec. 4320, Stats. 1919, so far as applicable to this case, reading, "Whenever a person is committed to jail on execution issued on a judgment recovered in a civil action, the creditor, his agent, or attorney shall advance to the jailer within twenty-four hours after such commitment, sufficient money to pay for the support of said prisoner during the time for which he may be imprisoned; and in case the money shall not be so advanced, or, if during the time the prisoner may be in confinement the money shall be expended in the support of such prisoner, the jailer shall forthwith discharge such prisoner from custody, and such discharge shall have the same effect as a discharge by order of the court," the defendant was discharged by due course of law, even though he was out on jail limits and paid for his own board. This contention is sought to be strengthened by the fact that an amendment to said section recommended by the joint committee on revision in 1878 adding these words to the section: "but such money need not be exhausted or paid when such person is on the liberties of the jail or not actually confined in such jail," was rejected by the legislature. It is

claimed this shows that it was the legislative intent that the prisoner's board must be paid whether he was confined in the jail or was out on jail limits. Plaintiff's answer to this contention is that even if it be conceded that the prisoner's board must be paid while on jail limits, it nevertheless appears in this case that the money advanced for board was never exhausted. The sheriff spent only $1.20 of it and returned to plaintiff $3.80 unexpended. The sheriff was required to account to the county for only the money actually expended by him for board of the prisoner, and properly returned the unexpended money. He boarded the prisoner only two days and expended $1.20 of the $5 for board; the balance of $3.80 was never spent for board. Hence, the contingency authorizing a discharge, namely, "if during the time the prisoner may be in confinement the money shall be expended in the support of such prisoner," never arose, and the prisoner was never lawfully discharged, for he claims no other mode of discharge.

This contention of plaintiff is well taken, but it is not necessary or advisable to place the decision upon such narrow grounds. It is quite evident that the requirement of prepayment of board in such cases is to protect the public against the expense of attempting to collect a tort judgment. When such expense is otherwise protected against, as in the case of the prisoner giving a bond and being allowed jail limits, the necessity of prepaying board ceases. The failure of the legislature to incorporate that explicitly into the statute must be ascribed to the fact that it was thought not necessary to state the obvious. It is therefore held that a prisoner on a tort judgment who gives bail and is out on jail limits relieves the judgment creditor from the prepayment of board from the time the prisoner leaves the jail. This is in conformity with the construction of similar statutes elsewhere. *Potter v. Robinson,* 40 N. J. Law, 114.

By the Court.—Judgment affirmed.

SEEMANN, Executor, Respondent, vs. KASTNER and another, Appellants.

December 14, 1921—January 10, 1922.

New trial: Newly-discovered evidence: Cumulative evidence: Due diligence in preparing for trial.

1. Where in an action by the buyer of potatoes against the sellers the question was whether the sellers had been notified within a reasonable time of the alleged frozen condition of the potatoes, testimony was given on behalf of the sellers as to the time within which the frozen condition of potatoes would become manifest, and one of their witnesses testified as to an experiment he had performed, a motion for a new trial on the ground of newly-discovered evidence obtained by putting frozen potatoes in a temperature of 35 to 40 degrees and observing how long it was before they indicated they had been frozen, will be denied, as the proposed evidence is merely cumulative to oral testimony produced at the trial.
2. Where defendants might have examined plaintiff before the trial, and from information so derived would have had opportunity to present evidence of an experiment with frozen potatoes, and one of the defendants made frequent visits to the place of business of the seller and could have seen how the potatoes were stored, the motion for a new trial was properly overruled because of the lack of the diligence essential in such an application.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

One Frank Seemann, Sr., of Milwaukee purchased on November 22, 1919, a carload of potatoes from defendants, who were commission merchants of the same place. The car was shipped from Pembine, Wisconsin, and the potatoes delivered by defendants at Seemann's place of business on the 22d and 24th of November and paid for on delivery.

On the trial in the civil court of Milwaukee county by a special verdict the court found:

That there was a representation by defendants at the time of the sale that the potatoes were in good, sound, and

merchantable condition. The jury found they were in a frozen condition at the time of the delivery at the place of business and that the defendants were notified of such frozen condition within a reasonable time after it had been learned. They also found the reasonable value of the market price of labor for the time reasonably necessary in sorting the frozen potatoes, but at an amount less than that claimed by plaintiff. No issue was raised as to the quantity of potatoes that could not be sold or used out of the carload lot or of the amount to be allowed for such quantity if plaintiff was entitled to recover.

Plaintiff's evidence was to the effect that such frozen condition was first noticed about seven or eight days after the potatoes were stored in the buyer's basement; that such basement was kept at a temperature of about 35 to 40 degrees Fahrenheit; that defendants were notified of such condition about two or three days after such discovery, and which the jury found was a reasonable period. Plaintiff also offered evidence of those claiming to be familiar with the storing and keeping of potatoes to the effect that such frozen condition would first reveal itself in potatoes kept at about that temperature in from one to two weeks after storage and that such was indicated by a moist or wet appearance on the outside of the potatoes.

Defendants' evidence was to the effect that no such claim was made until more than a month after such delivery (which would have been an unreasonable time); and also that such frozen condition would reveal itself within at least one or two days after being so stored.

The evidence on both sides was in substantial accord that the frozen condition would not be revealed by the outside appearance of such potatoes while they remained frozen.

The trial commenced on April 29, 1920, and on that day the plaintiff closed his testimony and witnesses were examined on behalf of the defendants and the case then adjourned to the following day, when the case was finished

and submitted to the jury. On May 8th motion for a new trial was made on the ground of newly-discovered evidence. As the basis for such relief plaintiff's attorney made and filed his affidavit reciting, among other things, as follows:

"Affiant further says that since the trial of said action, at which time it was unknown to the defendants or any of their witnesses, at what temperature the plaintiff claimed that the potatoes which were frozen were kept after they were unloaded from the car, so it was impossible to make any test in time for the trial of this action to ascertain as to what length of time it would take potatoes, kept at a temperature of 39 or 40 deg., to show effects of being frozen. That affiant procured the Wisconsin Cold Storage Company to make such test, from which it appears that within one hour after potatoes were kept in a temperature of 39 deg. or 40 deg. they would show that they were frozen, become wet and spongy. Affiant further says that owing to the fact that it was not known to the plaintiff (*sic*) until upon the trial of said action at what temperature said potatoes were kept, defendants were unable to produce witnesses to the facts aforesaid on said former trial."

Attached to the same was the certificate or affidavit of a storage or warehouse company in the following language:

"This is to certify that at the request of *Joseph Kastner* we put six (6) sound potatoes in our cold-storage room at a temperature of twenty-six degrees (26) on Saturday afternoon, May 8, 1920. On Monday morning, May 10th, at 8 o'clock a. m., we transferred the same potatoes into a temperature of 39-40. At 11 o'clock a. m. on May 10th, these same potatoes showed wet and spongy."

A new trial was granted by the civil court without stating the grounds therefor and upon payment to plaintiff by defendants of $15 and the witness fees as terms. From such order plaintiff appealed to the circuit court, where the order of the civil court was reversed and judgment directed for the plaintiff for the value of the damaged potatoes and the expense of sorting the same as found by the verdict. From such judgment the defendants have appealed.

The cause was submitted for the appellants on the brief of *F. F. Groelle* of Milwaukee, and for the respondent on that of *Harry M. Silber* of Milwaukee.

ESCHWEILER, J. An examination of the record satisfies us that the defendants on their motion for a new trial did not present sufficient grounds to warrant the trial court in granting them that relief and that plaintiff's motion for judgment should have been granted.

On the first day of the trial defendants' counsel cross-examined the witnesses produced by plaintiff on the exact and material point involved on the motion for the new trial, namely, the length of time it would require potatoes to show their frozen condition by their outward appearance when kept at the temperature of the basement in which they were stored and which was shown to be 35 to 40 degrees Fahrenheit. On the same day and as part of defendants' case a Mr. Gehl, who had been in the commission and produce business for thirty years and had handled potatoes in carload lots, was called and testified that a frozen potato stored at such temperature will become wet and thereby show such frozen condition within four hours and would be mushy or soft within twenty-four hours. On the following day he was recalled, and on direct examination by defendants' counsel testified that after the adjournment on the preceding day he had placed some potatoes in storage at a temperature considerably below freezing and had brought them with him into court, and then testified and showed to the jury that such potatoes, when exposed to the temperature of the court room, then about 65 degrees Fahrenheit, would become wet and disclose their frozen condition within half an hour. On this second occasion he was not again asked as to the length of time that would elapse before such condition would disclose itself if such frozen potatoes were kept at the temperature of 35 to 40 degrees Fahrenheit, nor any explanation then or now made as to why an experiment at such last

stated temperature was not or could not have been made similar to that then made.

The result of the experiment on May 8th to 10th and detailed in the affidavit accompanying defendants' motion for a new trial was made by another commission merchant than Mr. Gehl. The result of such experiment so detailed is in accord with the testimony of Mr. Gehl on that precise point as given on the first day of the trial and is purely cumulative and might well be deemed insufficient upon that ground alone. *Wilson v. Plank,* 41 Wis. 94, 96; *Sparling v. U. S. Sugar Co.* 136 Wis. 509, 514, 117 N. W. 1055; *Luebke v. Salzwedel,* 157 Wis. 601, 603, 147 N. W. 831. See note in L. R. A. 1916C, 1189.

It was as purely cumulative to the oral testimony already given as the proposed X-ray examination of an injured limb was held to be in *Hobart-Lee Tie Co. v. Keck,* 89 Ark. 122, 116 S. W. 183.

Furthermore, defendants might have availed themselves of an examination of plaintiff prior to the trial and have ascertained the necessary facts and have had ample opportunity to present on the trial the experiment recited in the affidavit. The record also discloses that one of the defendants made weekly visits at the place of business of plaintiff's decedent and could have seen where and how potatoes were stored from the first.

We think, therefore, that due diligence, which is an essential element in such applications (*Clithero v. Fenner,* 122 Wis. 356, 363, 99 N. W. 1027), was not shown. The proposed experiment was more of an after-thought than that which could be properly treated as newly-discovered evidence, and the circuit court was therefore clearly right in directing judgment for the plaintiff.

By the Court.—Judgment affirmed.

REGAS, Respondent, vs. HELIOS, Appellant.

December 15, 1921—January 10, 1922.

Principal and agent: Agent intrusted with money: Commission: Good faith.

1. The defendant, who advised the plaintiff to invest in the stock of a supposed corporation, and, under directions to make such an investment and bring plaintiff the certificate of stock, received moneys which he deposited in his bank to his private account and later paid to the agent of the purported corporation, taking the receipts therefor in his own name and not delivering to plaintiff any certificate, is guilty of conversion.
2. Money which has been intrusted to an agent for a special purpose and to be used in a particular manner is converted if the agent disposes of the property in a way or for a purpose not authorized, in a manner adverse to the owner, and inconsistent with his right of dominion.
3. In this state money is a subject of conversion.
4. That one charged with conversion acted in good faith is no defense, wrongful intent not being an essential element of conversion.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Affirmed.*

For the appellant there was a brief by *Gugel & Greenthal* of Milwaukee, and oral argument by *F. H. Gugel.*

A. W. Richter of Milwaukee, for the respondent.

JONES, J. This case is the story of the sad adventures of two Greeks in the realm of high finance.

In November, 1919, *James Regas,* plaintiff, and *Aristomanes Helios,* defendant, were neighbors and friends and lived in Milwaukee. The plaintiff had a shoe-shine parlor and defendant owned a barber shop. At this time one M. A. Dodge came into public notice as one who was said to be making fabulous sums from enterprises which were involved in more or less mystery, although it was reported that the production of films and a chain of ten-cent stores were among the sources of his wealth. The defendant testi-

fied that he himself had invested money in the Dodge corporation.

Plaintiff's testimony tended to prove that his attention was directed to the alluring enterprise by defendant, who expatiated upon the brilliant prospects and gave it as his opinion that by an investment of $1,000 plaintiff would be paid $2,000 in three months. Plaintiff paid over to defendant at first $850 and a little later $150. Defendant deposited these sums in his bank in his own name to his own account, and when Thurow, the agent of Dodge, returned from a short absence, paid the $1,000 to him and took receipts in his own name.

It is agreed that the Dodge scheme was a swindle; that there was no corporation; that Dodge "is doing time" and his agent Thurow was under arrest. As to other questions in issue the testimony is in conflict. The evidence of plaintiff tends to show that defendant agreed to invest the money in a corporation and bring to him the certificate of stock. This was denied by defendant. Plaintiff testified that defendant showed him the receipt, which he refused to accept. Defendant claimed that plaintiff made no objection to it, but asked defendant to hold it in his custody for safe keeping, and that he directed the investment to be made in the Dodge corporation in defendant's name.

When the time came for the returns which were expected, plaintiff began to ask for money and succeeded in getting at different times sums amounting to $400. Defendant claimed that these sums were loans, and plaintiff claimed that they were part payments of the $1,000 made after insistent demands and that defendant made repeated promises to pay the balance. After the Dodge bubble exploded the friendship between the two parties cooled to such an extent that plaintiff brought suit and had defendant arrested on a civil warrant.

It was held in both the civil and the circuit courts that defendant had converted the $1,000. The circuit judge

found as facts that the money was delivered to defendant on the express agreement that it should be invested in the name of plaintiff in a corporation and that the papers to be issued by it should be delivered to him within a few days after the receipt of the money; that no part of it should be used by defendant as his own and that no part of the investment should be made by defendant in his own name; that the $850 and $150 were deposited in defendant's name as above stated; that defendant failed and refused to invest the $1,000 in any corporation and in the name of plaintiff; and failed and refused to deliver to plaintiff any papers evidencing an investment in the name of plaintiff; that he converted the same to his own use, contrary to the instructions and agreement; and that he had returned $400 and had failed to return the balance.

The defendant made his first mistake when, without investigation, he advised his friend, the plaintiff, to make an investment in a speculative enterprise; but many men of more experience than defendant have given such advice and lived to regret it. He made another mistake in volunteering to act as agent in making the investment. So long as he acted in good faith these acts did not subject him to liability, but his mistakes did not end here. He proceeded to treat the money as his own by mingling it with his own funds, and thus assumed dominion over it. Instead of investing the funds in a corporation and securing a stock certificate and delivering it to plaintiff, as directed, he made an investment, if it may be so called, of an entirely different kind, for which he took a receipt in his own name. Whether the action of plaintiff in determining to make the investment was wise or unwise, he had the right to make such restrictions as he saw fit. If defendant had found that no such corporation as he had mentioned existed and had so informed plaintiff, the authority given might have been revoked.

The money was intrusted to defendant for a special purpose and to be used in a particular manner. It has some-

times been held that where an agent parts with property which he is authorized to sell for less than the stipulated price there is no conversion. See cases cited in *Laverty v. Snethen,* 68 N. Y. 522. But this is not the rule where he disposes of the property in a way or for a purpose not authorized, in a manner adverse to the owner and inconsistent with his right of dominion. That this is a conversion has been the rule for centuries. *Wilbraham v. Snow,* 2 Williams' Saunders' Rep. 87; *Boldewahn v. Schmidt,* 89 Wis. 444, 62 N. W. 177; *Laverty v. Snethen,* 68 N. Y. 522.

Although it has been sometimes held that money is not the subject of conversion, it is not the rule in this state. In an early case it was said by Mr. Justice PAINE:

"The only difficulty growing out of the nature of money is, as some of the cases have said, a difficulty of fact and not of law. In law, the rights of the parties in respect to the money are the same as in respect to any other property. The only difference is, that the identity of money is more easily destroyed than that of other property, and where the agent has so destroyed it, it can no longer be specifically recovered; not because the right no longer exists, but because of the difficulty in fact. But this difficulty does not exist in respect to the question of the liability of the agent for the conversion. So far as that is concerned, there is no more difficulty in showing its conversion than in showing the conversion of any other property. And that being so, it would follow that the agent should be held liable for converting it upon the same principle that he would be for converting any other." *Cotton v. Sharpstein,* 14 Wis. 226; note 20 L. R. A. N. S. 35; *Meyer v. Doherty,* 133 Wis. 398, 113 N. W. 671; *Milbrath v. State,* 138 Wis. 354, 120 N. W. 252; 26 Ruling Case Law, "Trover," § 8.

Although it is urged that defendant acted in good faith, this is no defense. Wrongful intent is not an essential element of conversion. *Boldewahn v. Schmidt,* 89 Wis. 444, 62 N. W. 177; *Cernahan v. Chrisler,* 107 Wis. 645, 83 N. W. 778; *Laverty v. Snethen,* 68 N. Y. 522; *Boyce v. Brockway,* 31 N. Y. 490, 493.

Defendant's counsel urge as error that testimony tending to prove statements of plaintiff's agent was rejected; but there was no sufficient proof of agency. It is also urged that plaintiff acquiesced in the defendant's dealing with the money intrusted to him. The trial court found no such acquiescence, nor do we. There is testimony that plaintiff repudiated the transaction when the receipt was shown him and afterward repeatedly and insistently demanded his money.

By the Court.—Judgment affirmed.

KUGLICH, Respondent, vs. FOWLE and another, Appellants.

December 15, 1921—January 10, 1922.

Hospitals: Personal injury to patient: Joint action against lessee physician and lessor hospital: Evidence as to relation of defendants: Competency: New trial.

1. In an action against a hospital and a physician for injuries to a patient while under the physician's care in such hospital, in which the hospital denied having operated, directed, or controlled the hospital at the time of such injuries, evidence that the defendant hospital had leased the premises to the physician and that it was merely a lessor of the premises and in no way connected with the treatment and care of the patient is admissible.
2. Since evidence tending to show the true relationship of the defendants was improperly excluded, it is impossible to say what the result of the trial would have been if the evidence had been admitted, and a new trial is therefore awarded to both defendants.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Personal injury. The defendant *Fowle* was called about 5 o'clock in the morning to the home of the plaintiff to attend her. She was at the time unconscious and remained so for nearly twenty-four hours. With the assistance of the husband she was removed to the *Ogden Hospital,* where hot-

water bottles and blankets were applied in an effort to induce perspiration, it having been discovered that she was suffering from uræmic poisoning. At about 11 o'clock in the morning, while still unconscious, the plaintiff was removed to the operating room, where an operation was performed for the purpose of inducing labor. The hot-water bottles were refilled, and when she was returned to the room four bottles were applied to the exterior portion of the legs, and the defendant *Fowle* personally handled a fifth bottle which he testified he wrapped, pinned, and placed between the plaintiff's legs. It is undisputed that it was this fifth bottle which caused the injuries complained of. A nurse returning from her lunch examined the plaintiff and discovered that the bottle in question had become exposed, the safety pin was unfastened, and the plaintiff had been burned by coming in contact with the unprotected bottle. Plaintiff was later delivered of a child, made a reasonably prompt recovery, and the burns healed, the doctor having performed skin grafting in order to hasten the healing.

This action is brought to recover damages for the injuries sustained by reason of the burns inflicted upon the person of the plaintiff. The jury found by special verdict:

First. That the defendants failed to exercise ordinary care in wrapping the hot-water bottle in question.

Second. That such failure was the proximate cause of plaintiff's injuries.

Fifth. That the plaintiff's husband did not undertake to care for her instead of having her cared for by a nurse.

And assessed the plaintiff's damages at $2,500. Upon a motion for a new trial the damages were reduced by the court to $1,800, for which amount the plaintiff elected to take judgment, and from judgment entered accordingly the defendants appeal.

For the appellants there were briefs by *George Carroll, Horace B. Walmsley,* and *William A. Schroeder,* all of Milwaukee, and oral argument by *Mr. Walmsley.*

For the respondent there was a brief by *Robert R. Free-*

man and *Henry J. Bendinger,* both of Milwaukee, and oral argument by *Mr. Freeman.*

ROSENBERRY, J. The first contention of the defendants is that there is not sufficient evidence to sustain the finding of the jury to the effect that the defendants were negligent. In view of the fact that there must be a new trial, we shall not discuss or comment upon the evidence; suffice it to say that we have carefully examined it and are of opinion that there was sufficient evidence in the record to sustain the verdict of the jury.

The defendants appeared separately at the trial and each separately denied the allegations of the complaint. Upon the trial the attorney for the defendant *Hospital* asked several questions for the purpose of establishing the exact arrangement between the *Ogden Hospital,* a separate corporation, and the defendant *Fowle,* by whom the hospital was operated. The court sustained objections to these questions. In the answer of the *Hospital* appears the following allegation:

"This defendant admits that the *Ogden Hospital* is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin; but denies that as such corporation it at the times mentioned in said complaint operated, directed, or controlled for hire a hospital for the benefit of medical or surgical cases, or for any purposes whatsoever as alleged in the complaint."

Upon the motion for a new trial there was filed on behalf of the defendant *Hospital* an affidavit which is uncontradicted, from which it appears that the *Ogden Hospital* leases the premises to the defendant *Fowle,* receives a stated sum as rental, and that the relation between the *Ogden Hospital* and *Fowle* is that of landlord and tenant; that the hospital is operated by the defendant *Fowle* at his own risk as to loss or gain, and that the corporation does not share in the profits or losses of the enterprise and has no interest

therein other than as lessor. On behalf of the plaintiff it is urged that it appears from the record that the defendant *Fowle* was a physician and surgeon; that he was in charge of the hospital; that he was also the secretary and treasurer of the *Ogden Hospital;* that upon the day on which the plaintiff entered the hospital her husband paid to *Dr. Fowle* a sum to cover hospital services. Admitting all of these facts to be true, it does not follow that the *Ogden Hospital* ever undertook to render either hospital or medical services to the plaintiff. The word "hospital" is used in many senses, and the fact that the plaintiff paid *Dr. Fowle* a stated sum for hospital services is no proof that the *Ogden Hospital* undertook to render service to the plaintiff. The mere fact that the word "hospital" is used in the corporate name does not alter to any extent the relation of the parties. Under the pleadings the defendant *Hospital* was entitled to show that it did not undertake to render services and that it was merely a lessor of the premises and not in any way concerned with the treatment and care of the plaintiff. The court erred, therefore, in rejecting the evidence offered to prove the real relationship existing between the defendants, and further erred in not granting a new trial.

While the rejection of the testimony offered by the *Hospital* was not error as to the defendant *Fowle,* nevertheless the case was tried against both defendants, both were found guilty of negligence, and it is impossible to say what the result of the trial would have been had the court permitted the true relationship of the defendants to be established. After careful consideration we are of the opinion that there should be a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

FIRST NATIONAL EXCHANGE BANK, Respondent, vs. HARVEY, Appellant.

December 15, 1921—January 10, 1922.

Judgment: Equitable relief to restrain enforcement: Laches.

1. A court of equity will relieve from a judgment obtained through perjury where the defendant comes into court with clean hands and has been guilty of no laches; but it demands a very high degree of proof before it will restrain the enforcement of a judgment upon that ground.
2. Equity will not afford relief to a party that was passive and indifferent at a time when he might have secured his rights in a court of law.
3. In an action in this state to enforce judgments rendered in the courts of Ohio (based upon promissory notes), defendant put in a counterclaim for equitable relief on the ground that the judgments were procured by perjury, which contained no allegation that he appeared in the original action in any manner, that he introduced any defense whatever, that he used due diligence or did anything to challenge the *bona fides* of the plaintiff's title to the notes, or to put it to its proof upon the question of whether it was a holder in due course. *Held,* defendant was guilty of laches, and a demurrer to his counterclaim was properly sustained.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to defendant's counterclaim.

This action is brought to recover on two judgments, aggregating about $4,400, rendered against one J. E. Latimer and the defendant, *Harvey,* in the courts of Ohio. The defendant counterclaimed for equitable relief enjoining the enforcement of the judgments, for the reason that the same were procured by fraud, conspiracy, and perjury. The counterclaim alleges, among other things, that the judgments sued upon were based on certain promissory notes which grew out of the following transaction: On or about the 1st day of October, 1913, one J. E. Latimer of Cleveland, Ohio, had a leasehold interest in certain property in that

city, and by the terms of which, among other things, he was required to erect thereon a building at a cost of not less than $50,000. There was a provision in the lease that it should not be assigned without the consent of the lessor. On or about said date defendant and said Latimer entered into an agreement whereby the said Latimer agreed to procure the written consent of the lessor to an assignment of said lease to defendant and whereby the defendant agreed to pay to said Latimer certain sums of money expended by him for rental, taxes, premium on bond given by Latimer to the lessor as security for the performance of the lease, etc., pursuant to which agreement, and before the assignment had been executed or the consent of the lessor to such assignment had been procured, the defendant paid to the said Latimer the sum of $1,000 and executed his promissory notes for the balance; that when said notes became due said Latimer had not procured the consent of the lessor to the assignment of said lease nor had the assignment been executed, and the notes were renewed upon the promise of the said Latimer to comply with the terms and conditions of the said agreement and to procure the consent of the lessor to the assignment of said lease and to assign the same; that said Latimer never did assign said lease nor procure the consent of the lessor to said assignment, and that he failed in every respect to carry out his agreement in that behalf, and that the consideration for said promissory notes entirely failed; that before the aforesaid notes became due, the said Latimer, knowing that the consideration for said notes wholly failed, unlawfully combined and conspired with one N. R. Wildman, a broker in real estate and commercial paper then residing and doing business in Cleveland, to have said notes transferred in form to some third person, either before or after maturity thereof, and to have said transferee falsely claim and assert that the notes had been acquired by said transferee in good faith, for a valuable consideration, without knowledge of the failure of consideration for which said

notes were given and without knowledge of any defense thereto, and to have such transferee falsely claim and falsely swear in court in such action that said two notes were acquired by him in due course; that thereafter and before the commencement of the actions which resulted in the judgments mentioned in the complaint, the said J. E. Latimer and N. R. Wildman, in pursuance of said conspiracy, induced the plaintiff herein, as defendant is informed and believes, to enter into said unlawful combination with full knowledge that the consideration of said notes had failed, and the purposes and objects of the conspiracy entered into between Latimer and Wildman and the said plaintiff did, as defendant is informed and believes, enter into said conspiracy before the commencement of either of the actions which resulted in the judgment mentioned in the complaint herein, and in pursuance thereof the said plaintiff agreed to have the said two notes transferred to it either before or after maturity thereof, under the conditions so unlawfully agreed upon, and as such transferee to bring action upon said notes and obtain judgments thereon by the means so agreed upon between said Latimer and Wildman; that the plaintiff accepted the transfer of said two notes either before or after maturity thereof, and to *defendant's own knowledge* said plaintiff acquired both of said notes with full knowledge and due notice that the consideration thereof had wholly failed, *and, as defendant is informed and believes,* without paying a valuable consideration therefor; that it brought action upon said notes in pursuance of said conspiracy and through its officers, agents, or attorneys, by falsely swearing in court, as *defendant is informed and believes,* that it was a *bona fide* owner and holder of said notes; that it acquired the same before maturity, in due course, etc., obtained the judgments, etc.; that at the time of the trial of said actions defendant had no knowledge of the conspiracy.

It is further alleged that at the time of the trial of the original actions defendant had no knowledge or information

of the conspiracy or the purposes or objects thereof, and had no knowledge or information as to whether said notes were acquired in good faith before maturity or for a valuable consideration, but that all such knowledge and information has been derived by the defendant since the trials of said actions and since the rendering and entry of said judgments, "for which reason this defendant was unable to interpose as a defense to the actions which resulted in said judgments the facts herein alleged and set forth." There is no allegation in the counterclaim that the defendant in any manner appeared in said actions, or that he made any effort to use any diligence to ascertain whether the plaintiff was the holder in due course of the notes upon which the judgments were rendered.

The plaintiff demurred to the counterclaim, which demurrer was sustained, and from the order sustaining the demurrer defendant, *Harvey,* brings this appeal.

The cause was submitted for the appellant on the brief of *Curtis & Mock* of Milwaukee, and for the respondent on that of *Bottum, Hudnall, Lecher & McNamara* of Milwaukee.

OWEN, J. The defendant seeks to invoke the aid of a court of equity to prevent the enforcement of the judgments sued upon on the ground that they were procured by means of perjury. True, fraud and conspiracy is also alleged, but it does not appear that such fraud and conspiracy in any manner restrained the defendant from interposing a defense to the original causes of action or influenced his conduct with reference thereto in any way. He was not deceived or misled by the alleged conspiracy, and if the court was imposed upon in any manner it was by virtue of the perjury which the defendant alleges, upon information and belief, occurred at the trial. We treat the counterclaim, therefore, as one asking for equitable relief on the ground that the judgments were obtained through perjury. That

this court will relieve from a judgment so obtained, where the defendant comes into court with clean hands and has been guilty of no laches, is established by *Stowell v. Eldred,* 26 Wis. 504; *Boring v. Ott,* 138 Wis. 260, 119 N. W. 865; and *Laun v. Kipp,* 155 Wis. 347, 145 N. W. 183. We deem it unnecessary to consider whether the counterclaim sets forth a good cause of action under the doctrine of those cases, and pause, in passing to a discussion of the decisive question in the case, only to remark that a court of equity demands a very high degree of proof before it will restrain the enforcement of a judgment upon the ground that it was obtained by perjury, and the character of the allegations of this counterclaim affords little assurance that that high degree of proof is at hand. It will be noticed that the allegations of perjury are made upon information and belief and that no individual is named as having committed perjury in the procuring of the judgments sued upon. While it is quite probable that the defendant could make the allegation in no other form, it is not unreasonable to suppose that his then information pointed to some individual upon whose perjured testimony the judgments were procured. If his investigations and information had not gone to that extent at the time of the preparation of his pleading, there is little reason to believe that he could bring to the support of the allegations of his counterclaim that high degree of proof essential for the granting of the relief prayed for. Furthermore, it seems quite probable that the judgments were rendered upon the mere production of the notes and in the absence of any sworn testimony; all of which is said not for the purpose of demonstrating that the counterclaim is vulnerable upon demurrer, but to suggest that the general tone thereof does not give assurance of much probability that plaintiff could prove a cause of action even though he may have technically pleaded one.

Passing to the decisive question in the case, we hold that the demurrer must be sustained, on the ground that the de-

fendant is guilty of laches. The counterclaim contains no allegation that the defendant interposed any defense in the original action resulting in the judgments sued upon. The counterclaim is silent as to whether he permitted the judgments to go against him by default, but such we deem to be the plain inference from the pleading. We have, then, a case where the defendant was sued upon promissory notes the consideration for which had utterly failed. He made no attempt to defend the action upon such ground. This fact is set forth in the counterclaim and sought to be excused on the ground that he did not know at that time that the plaintiff was not a holder in due course. This is not the conduct of one who is diligent in the protection of his legal rights. The most liberal construction that can be given to the allegations of the counterclaim is that he did not know that the plaintiff was a holder in due course. It was incumbent upon him to challenge that fact, to demand affirmative proof thereof, and to avail himself of his right of cross-examination. But there is no allegation in the counterclaim that he appeared in the action in any manner; that he interposed any defense whatever, or that he did anything to challenge the *bona fides* of the plaintiff's title to the notes or to put it to its proof upon the question of whether it was a holder in due course. There is no allegation that he made any attempt to ascertain what the fact was in that respect, and there is a lack of any showing that any diligence whatever was used to ascertain whether the plaintiff was in fact a holder in due course. If the pleading were used as the basis of a motion for a new trial on the ground of newly-discovered evidence, the motion would have to be denied under our rules of practice because of a lack of any showing upon the question of due diligence. It is a general principle of equity that it will not interfere to afford relief where legal redress is available, and in order for the defendant to have any standing in a court of equity to secure the relief sought by his counterclaim he must show that he made use of and ex-

hausted the opportunities available to him in the original action. This he has failed to do, and as he was passive and indifferent at a time when he might have secured his rights in a court of law, equity will not now afford him relief.

By the Court.—The order appealed from is affirmed.

DIEFENBACH, Respondent, vs. JARETT, Appellant.

December 16, 1921—January 10, 1922.

Insurance: Agreements to divide commissions: Validity: Money had and received.

1. Sub. 2 (e), sec. 1955*o*, Stats., relating to division of commissions by insurance agents, is construed not to forbid two licensed agents of the same company from assisting each other in their work or prevent concerted action by them in procuring insurance from the same person, and the commissions so earned will be divided in accordance with a prior agreement of the agents.
2. In an action by one insurance agent against another for money had and received, on the ground that the defendant had received from the company commissions which the plaintiff helped to earn, plaintiff must prove that defendant received the money. The record being silent as to this fact, the case is remanded to the trial court to take testimony and determine the question.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Reversed.*

The appeal is from a judgment in favor of plaintiff for $5,225.38.

The complaint alleged, in substance, that plaintiff, an agent of the Mutual Insurance Company of New York, agreed with defendant, *Jarett,* an agent of the same company, that they should jointly undertake to write insurance upon the lives of certain men in Marinette, Wisconsin; that the commissions received should be divided equally; that in pursuance of this agreement the policies contemplated were written up; and that defendant now retains the entire com-

missions for certain of the policies, to one half of which plaintiff is entitled.

The evidence shows that plaintiff, after writing a $2,000 policy upon the life of one Charles Lauerman, was of the opinion that a much larger amount could be secured from said Lauerman and certain of his relatives; that in order to obtain the largest amount possible, he secured the services of defendant, he being more proficient in the handling of large policies; that after an introduction by the plaintiff they jointly placed upon the lives of Charles Lauerman and Frank Lauerman insurance to the amount of $200,000; that thereafter defendant, unknown to plaintiff, returned and secured additional policies to the amount of $200,000 and collected certain renewal commissions, all of which latter commissions he refused to divide.

It appears that suit was begun in January, 1919; that the case was twice continued by reason of the sickness of defendant, who was in New York; that a request for another continuance for the same reason on March 14, 1921, was refused and the case then called for trial. Both parties moved for judgment.

The trial court held that the transaction was a joint undertaking whereby each was to receive half of the commissions in consideration of services performed, and judgment was rendered accordingly.

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *Paul R. Newcomb,* all of Milwaukee.

Charles E. Hammersley of Milwaukee, for the respondent.

JONES, J. This case involves the construction of sub. 2 (e), sec. 1955*o*, Stats. So far as material it provides as follows:

"*Division of commissions.* (e) Any agent may pay the whole or any part of his commissions to:

"(1) An agent, other than a life agent, holding a certificate of authority under section 1976 for writing the kind of insurance for which such commissions are paid.

"(2) A nonresident insurance agent, or any insurance company authorized in this state, as to insurance upon property owned by nonresidents or located wholly outside of this state.

"(3) A nonresident agent of the fidelity or surety company paying such commissions. Except as aforesaid, no agent shall pay the whole or any part of the commissions upon any policy to any other person."

It is urged by appellant's counsel that this statute prohibits any such division of commissions between agents as is claimed in this action. It is urged that it was the object of the statute to prevent rebating; also to prevent the concerted action of two or more agents, and the annoyance which would result to those who might be solicited to take insurance. It is argued that another purpose was to destroy some of the incentive to pay large commissions to life insurance agents.

There are various other statutes regulating the mode of conducting life insurance, all doubtless designed to prevent various abuses which had existed. One statute prohibits persons from effecting insurance without having obtained a certificate or license. Sub. 1, sec. 1976, Stats. Another provides that no corporation or stock company shall be licensed as agent. Sub. 6, sec. 1976. Another prescribes the qualifications of agents. Sub. 7, sec. 1976. Another clause provides that every company shall file a schedule of percentages or kinds of commissions paid to agents within the state. Sub. 4, sec. 1977. But no statute has been cited, and we find none, which forbids such a transaction as was proved in this case, unless it be the section above quoted and relied on by appellant.

The first policy of $2,000 was secured by plaintiff without the aid of defendant. Then policies amounting to $200,000 were obtained by them jointly upon the lives of

persons contemplated by the agreement. For these last policies applications were signed by both plaintiff and defendant, and the commissions were equally divided, apparently without objection by defendant or the insurance company. Then, as found by the trial court, the defendant, disregarding his agreement, procured $200,000 more insurance from the same persons, collected the commission thereon, and refused to account to the plaintiff.

Both plaintiff and defendant were duly licensed agents of the same company. Except for the plaintiff's initiative and effort the defendant would not have received any of the commission. Unless the statute forbids, justice clearly demands that the commissions should be divided according to the agreement. Under the agreement the commissions were not earned by defendant but by the joint efforts of both parties. Although defendant may have been paid the entire amount of commissions on the last $200,000, they were not his commissions within the meaning of the statute. We do not believe that it was the purpose of the statute in question to forbid two licensed agents of the same company to assist each other in their work. Such co-operation may be of material advantage to them and to insurance companies as well.

As we construe the statutes we have mentioned, it is their purpose to regulate the conduct of companies and agents in their business and to prevent abuses, but not to discourage life insurance or its solicitation by agents. It is a matter of common knowledge that insurance agents duly licensed by the same company frequently act jointly in writing insurance, and the practice has been very generally permitted by the companies and has not been disapproved by the department of insurance. If it is a practice which is to be condemned by the legislature, the statute should be so amended that the disapproval will be clearly expressed.

Appellant's counsel objected to the ruling of the court excluding the contract between the insurance company and the

plaintiff. This contract might be material in litigation between plaintiff and the company relative to commissions, but this is not such an action. We find nothing in the contract which would prevent plaintiff from recovering from a third party a commission received by him from the company which had been earned by their joint efforts under such an agreement as is here relied on.

Defendant's counsel argue that there must be a new trial on the ground that there was no proof that defendant had received from the company the commissions earned.

The action is for money had and received based upon the agreement between the parties, and of course it is necessary to a recovery to prove that defendant received the money sued for. The trial court found that defendant collected and received the premium and renewals upon the policies. There is proof that the premiums were collected, but after careful examination of the printed case and record we find no proof that the commissions were paid by the insurance company to the defendant. Such payment is denied in the answer, and the failure of proof is insisted on by defendant's counsel. It is asserted in the brief of plaintiff's counsel that defendant admitted receiving the commissions in an examination under sec. 4096, Stats., and that it was not disputed at the trial. But no such facts appear in the record.

There seems to be no good reason for a new trial on all the issues. Upon the return of the record to the circuit court, the court should proceed to take testimony on the question whether the commissions involved were paid to the defendant, and if it is found that they were so paid judgment should be rendered in favor of plaintiff for one half the amount, with interest.

By the Court.—Judgment reversed, and cause remanded for further proceedings as indicated in this opinion, with costs to appellant.

FERNHABER, Trustee, Respondent, vs. CREAM CITY CARTAGE COMPANY and another, Appellants.

December 16, 1921—January 10, 1922.

Fraudulent conveyances: Proof required: Transactions with relatives: Evidence: Bankruptcy: Action by trustee: Necessity of showing insufficiency of assets: Waiver.

1. In an action of replevin by a trustee in bankruptcy to recover property transferred by chattel mortgages alleged to be in fraud of creditors, in order to prove fraud it is necessary to show not only that the mortgagor executed the chattel mortgages without adequate consideration or with intent to hinder, delay, or defraud his creditors, but that the mortgagees at the time either knew of such intent or had knowledge of such facts and circumstances as would put a prudent man on inquiry, which if prosecuted with ordinary diligence would lead to a knowledge of such intent.
2. The mortgaging of property to the mortgagor's father and mother-in-law did not of itself constitute fraud, but was a circumstance proper to be shown, and calls for closer scrutiny and clearer explanation of the transaction than in case of ordinary transfers.
3. Under sec. 2323, Stats. 1917, making the question of intent in fraudulent conveyances one of fact for the jury, evidence as to the fraudulent intent of the mortgagor is *held* sufficient to go to the jury.
4. On the cross-examination of a witness, where the question of fraudulent intent is involved, the rules prohibiting leading questions and requiring the best evidence must be greatly relaxed and in many instances ignored; and it is error not to permit an exhaustive and searching cross-examination of the party charged with committing fraud.
5. Under secs. 57 and 65 of the federal Bankruptcy Act (30 U. S. Stats. at Large, 544, ch. 541), as to allowance of claims and dividends thereon, in a suit to regain property transferred by a bankrupt in fraud of creditors the trustee in bankruptcy must allege and prove that claims of creditors have been filed and allowed and that the assets are insufficient to satisfy such claims; but the objection that the trustee did not prove that the assets were insufficient to meet the claims of the creditors, which was not raised at the trial, cannot be raised on appeal.

APPEAL from an order of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This is an appeal from an order of the circuit court entered March 1, 1921, vacating a judgment of the civil court of Milwaukee county in favor of the defendants and ordering a new trial in the circuit court. The judgment in the civil court was based upon a directed verdict in favor of the defendants.

It appears that in the month of August, 1918, the defendant *Werner Stein* and one Hubert, being then copartners, executed to one A. W. Stein, the father of *Werner Stein,* a chattel mortgage in the usual form for $1,500. At the time of the execution of such mortgage the copartners were indebted to the Pauly Motor Truck Company on a balance for $180, and it was claimed by *Werner Stein* that the Motor Truck Company threatened to foreclose on its chattel mortgage unless such balance was paid. The defendant *Werner Stein* claimed that he secured from his father, A. W. Stein, the sum of $180 in cash with which to pay such balance due the Motor Truck Company and that such sum was used in the cancellation of the Motor Truck Company's claim. It was further claimed by both *Werner Stein* and his father, A. W. Stein, that from time to time since the year 1912 A. W. Stein advanced to *Werner Stein* numerous sums of money in various amounts, used by him both in his business and for his individual purposes, and that *Werner Stein* was also indebted to A. W. Stein for alleged work performed by the latter for the former for which he had not received pay. The testimony disclosed that *Werner Stein* never kept an account of moneys received by him from his father, and that he at no time executed a receipt or any evidence of indebtedness to his father for advancements made or for work and labor performed, and that he was unable to state the exact amounts borrowed or owing or the time when such loans or amounts became due; and that no prior demand had ever been made by A. W. Stein of *Werner Stein* for the payment of any of the items of indebtedness referred to or of any interest on said items.

A. W. Stein testified, among other things, that he kept a memorandum of the various amounts of money advanced to his son, and of charges for work and labor, in a small pocketbook, but that he was unable to produce such book upon the trial for the reason that it had been destroyed in a fire.

Mr. Hubert, one of the partners, testified that at the time of the execution of the chattel mortgage to A. W. Stein, *Werner Stein* told him that he feared the Motor Truck Company would seize upon his truck by virtue of its chattel mortgage, and that the only way to avoid such threatened action would be to execute a blind mortgage to his father for the sum of $1,500, and thus save the trucks from being seized by creditors. Hubert further testified that *Werner* told him at the same time that he was not indebted to his father.

About four months after the execution of said chattel mortgage to A. W. Stein the latter seized, among other things, the five-ton Republic truck referred to in the affidavit of replevin herein, and under and pursuant to proceedings had by virtue of said mortgage said truck was sold to one Arnold Stein, a nephew of A. W. Stein.

Shortly before the seizure of the Republic truck *Werner Stein* executed to his mother-in-law, a Mrs. Schattschneider, a chattel mortgage in the usual form on a three-ton Packard truck, in the sum of $1,500. At the time of the execution of the latter chattel mortgage *Werner Stein* was indebted to the Merchants & Manufacturers Bank of Milwaukee upon secured notes amounting to about $1,100. The bank did not press payment of these notes, nor were the notes due at the time. Nevertheless, it appears that the indebtedness to the bank, amounting to about $1,100, was paid by *Werner,* and it was further claimed that the balance of the amount received by him from his mother-in-law was used by him in the payment of various items of indebtedness owing by him in his business. Upon cross-examination of *Werner* he was unable to state what the various

amounts paid by him consisted of, nor was he able to prove such alleged items of indebtedness, excepting only by general oral statements.

Shortly after the execution of the Schattschneider mortgage the mortgagee levied upon the Packard truck, and upon proceedings had under chattel-mortgage sale the same was sold to the mortgagee, Mrs. Schattschneider.

Shortly thereafter A. W. Stein, Mrs. Schattschneider, and Arnold Stein incorporated the defendant *Cream City Cartage Company,* a corporation with a capital stock of $5,000, and Arnold Stein and Mrs. Schattschneider, respectively, transferred to said corporation the two trucks so sold as aforesaid under chattel-mortgage sale, and pursuant to such transfer stock of the corporation was issued to such parties.

In the month of April, 1919, and after the organization of the defendant corporation, *Werner Stein* made a voluntary assignment for the benefit of his creditors and subsequently thereto was declared a bankrupt, and in the course of the bankruptcy proceedings the plaintiff, *Louis Fernhaber,* was appointed the trustee in bankruptcy and began this action of replevin to recover from the defendant company, among other things, the five-ton Republic and the three-ton Packard trucks.

It is the contention on the part of the plaintiff that the defendant company holds these trucks in violation of the rights of creditors; that the transfer to the defendant company was without adequate consideration and in fraud of the creditors of *Werner Stein;* and that the plaintiff, as the representative of the creditors, is entitled to these trucks as a part of the assets of the bankrupt.

For the appellants there were briefs by *Rowan, Kalaher & Stoecker* of Milwaukee, and oral argument by *F. J. Rowan.*

For the respondent there was a brief by *E. J. Koelzer,* attorney, and *Hennessey & O'Boyle,* of counsel, all of Milwaukee, and oral argument by *Oliver L. O'Boyle.*

DOERFLER, J. Did the execution of the chattel mortgages and the subsequent sale of the trucks in question constitute conveyances made with intent to hinder, delay, or defraud creditors of the bankrupt? Under sec. 2323, Stats. 1917, the question of intent to defraud in a case like the instant case is made a question of fact, and therefore a question for the jury. In order to prove fraud in the instant case it is necessary not only that the bankrupt executed the chattel mortgages without adequate consideration or with intent to hinder, delay, or defraud his creditors, but that the mortgagees at the time either knew of such intent or had knowledge of such facts and circumstances as would put a prudent man on inquiry, which if prosecuted with ordinary diligence would lead to a knowledge of such intent. *Kaufer v. Walsh*, 88 Wis. 63, 70, 59 N. W. 460; *Hopkins v. Langton*, 30 Wis. 379; *Hooser v. Hunt*, 65 Wis. 71, 26 N. W. 442.

Fraud is the product of greed and selfishness. It is generally designed in secret and operates in the dark. It results from the desire of cunning and designing persons to injure others and to benefit themselves. The plans pursued, as a rule, are carefully premeditated and executed. When a general scheme is concocted by persons closely tied by blood or marriage relationship, it is oftentimes impossible or difficult to unravel, and in a vast majority of cases the fraudulent intent and the participation of all parties therein can only be proven inferentially by circumstantial evidence.

The fact that *Werner Stein* executed these mortgages to his father and to his mother-in-law did not of itself constitute a badge of fraud, but the execution of such mortgages constitutes circumstances proper to be shown, and, when shown, calls for closer scrutiny and clearer explanation of the transaction. *Bleiler v. Moore*, 88 Wis. 438, 60 N. W. 792, and *Hoxie v. Price*, 31 Wis. 82.

Not only did *Werner Stein* execute these two chattel mortgages to very close relatives during periods of time while he was heavily indebted and threatened by creditors,

but the foreclosures of these two mortgages followed each other closely in point of time, with similar results, all indicating a common design from which a jury could readily deduce concerted action to effectuate a common purpose. The foreclosures of the chattel mortgages were followed by the organization of the defendant company, the transfer of the mortgaged property to the company, and the issuance of stock as above stated, all with the result that in the end the valuable and available assets of the debtor came into the hands of the defendant corporation, with all of the stock held by his immediate and close relatives. The organization of the defendant corporation was followed by the defendant *Stein's* voluntary assignment for the benefit of his creditors, and as a final result the defendant *Werner Stein* was declared a bankrupt.

Now let us view the issues involved from the standpoint of other facts and circumstances adduced. When the mortgage for $1,500 was executed to A. W. Stein, it appears from the testimony of Hubert that *Werner Stein* told him that he, *Werner,* was not indebted to his father, but that his object in executing the blanket mortgage to his father was to protect the property from his creditors, and that in any event he could have implicit faith in his father, and that his father would not do anything harmful or detrimental to him. *Werner Stein* also testified that he kept no account of moneys advanced to him by his father, covering a long period of time, or of any indebtedness owing by him to his father for work performed, and that his father at no time had made prior demands of him for repayment of the sums owing. Nor does it appear from the evidence that the father had made prior demands for payment of the sums advanced or of other indebtedness, and it appears that the only memorandum kept of the alleged indebtedness was contained in a little pocketbook which had been destroyed by fire.

The indebtedness to the Merchants & Manufacturers Bank was not even due, and the bank did not press the debtor

for payment. Mrs. Schattschneider, the mother-in-law, testified that she raised the $1,500 which she claimed to have given to her son-in-law on a mortgage on her real estate, and at the same time testified that at the time she had $1,400 in cash in her home which she was afraid to deposit or leave with a bank for fear of losing it by so doing.

Under the clear outstanding facts and circumstances as above detailed a situation arose which required the submission to the jury of the question of fraudulent intent and the participation of all parties interested, under the provisions of sec. 2323, Stats. 1917, and under the decisions in *Kaufer v. Walsh,* 88 Wis. 63, 59 N. W. 460, and *Rindskopf v. Myers,* 87 Wis. 80, 57 N. W. 967.

We therefore conclude that the civil court erred in directing a verdict for the defendants, and that the circuit court was fully justified in setting aside the judgment of the civil court and in ordering a new trial.

During the course of the trial in the civil court numerous questions were asked of the defendant *Werner Stein* and of other witnesses on cross-examination, with the object and purpose, evidently, of testing the credibility of the witnesses and of disclosing circumstances which might properly have been considered in determining whether or not the transfers above referred to were made with fraudulent intent. Upon objections being interposed the cross-examination was greatly restricted, and in many instances proper inquiry was frustrated. While the learned circuit judge, in his order setting aside the judgment of the civil court and in granting a new trial, did not specifically give his reasons for his action, nevertheless it can readily be presumed that such rulings on the part of the trial court did not accord, but on the contrary prevented, a thorough investigation, as is contemplated in fraud cases, of the issue of fraudulent intent involved in the trial.

The object of all examinations, direct and cross, is to elicit the truth. The rules pertaining to direct examination,

which prohibit leading questions and require the best evidence, etc., are designed solely for the purpose of eliciting the truth. On cross-examination, however, particularly where the question of fraudulent intent is involved in the issues, these rules must be greatly relaxed and in many instances ignored. The latter deviation is also based upon the general object and purpose in the law pertaining to trials for the purpose of ascertaining and eliciting the truth.

It is therefore said in Jones, Evidence (2d ed.) § 842, that "Where the issue is whether fraud has been committed, it is error for the court not to permit an exhaustive and searching cross-examination of the party against whom the imputation is made." See, also, *Kalk v. Fielding,* 50 Wis. 339, 7 N. W. 296; *Anderson v. Walter,* 34 Mich. 113.

Of course the limitation of cross-examination is to a large extent within the discretion of the trial court. However, in the instant case we are convinced that in unnecessarily restricting the cross-examination the court committed error, and as the result thereof plaintiff was unable to pursue his inquiry adequately in an effort to establish the necessary facts and circumstances which were the proper subject of inquiry.

Defendants on this appeal argue that inasmuch as the plaintiff failed to prove the condition of the bankrupt's estate and that claims were filed in such bankrupt estate, no necessity was shown for the bringing of this action. In *Mueller v. Bruss,* 112 Wis. 406, 412, 413, 88 N. W. 229, this court held:

"Unless it is made to appear that the property so conveyed is needed to pay the claims filed against the debtor, the trustee has no right to set such conveyances aside."

The trustee represents the creditors, and with all the rights of the creditors to avoid fraudulent transfers. In short, the creditors are prevented, by the paramount act of Congress, from obtaining judgment upon which to base the right to attack the conveyance of their debtor. But this does not

obviate the necessity of the trustee alleging and proving that claims of creditors have been filed and allowed as contemplated by law. He may question the *bona fides* of the transfer of the debtor's property in the interests of those creditors only to whom he may distribute the estate which shall come into his hands. That outstanding obligations exist is not enough. Unless these are established and allowed, as authorized by statute or the act of Congress, he has no authority to pay them from moneys that may come into his hands, to say nothing of the property the debtor has transferred to others. And unless it appears that the representative of the creditors may appropriate the proceeds of property in the hands of third parties to the satisfaction of the debtor's obligations, setting aside transfers to them as fraudulent would be of no practical advantage. Sec. 57 of the Bankruptcy Act (30 U. S. Stats. at Large, 544, ch. 541) provides for the proof, adjudication, and allowance of the claims of creditors, and sec. 65 directs the declaration of dividends on all allowed claims. Where no claims are allowed there are no dividends to be paid by the trustee, and therefore no occasion to interfere with the property in the hands of third persons. To entitle the trustee to relief the assets must appear insufficient to satisfy the claims of creditors. *Crary v. Kurtz,* 132 Iowa, 105, 105 N. W. 590, 593; *Deland v. Miller & Cheney Bank,* 119 Iowa, 371, 93 N. W. 304. In 17 L. R. A. N. S. 351, an exhaustive collection of cases on the subject will be found.

At the close of the testimony in the civil court the defendants moved for the direction of a verdict. The court in its oral opinion based its direction solely upon the ground that the plaintiff had failed to prove a fraudulent intent and a failure on the part of the mortgagees and of the defendant corporation to participate in such fraudulent intent.

There is nothing in the record in the civil court to indicate that the point made in this branch of the case by defendants' counsel was called to the attention of the trial

court. Nor does the record in the circuit court disclose that such point was brought to the attention of that court. Had the trial court's attention been called to this point, an opportunity would have been afforded the plaintiff to prove the necessary requirements, which the trial court would have readily granted in the interests of truth and justice. The question having been raised, however, for the first time on this appeal, appellants' counsel cannot take advantage thereof. *Cappon v. O'Day,* 165 Wis. 486, 162 N. W. 655.

The order of the circuit court setting aside the judgment of the civil court and ordering a new trial is therefore affirmed.

By the Court.—Order of the circuit court affirmed.

GREENBERG, Appellant, vs. PERLSON and another, Respondents.

December 16, 1921—January 10, 1922.

Sales: Goods not conforming to contract: Rejection by buyer: Disposition: Option of buyer: Reasonable market value.

Under sec. 1684*t*—49 and sub. 1 (a), sec. 1684*t*—69, Stats., the buyer of goods, having upon delivery telegraphed the seller rejecting the shipment as not of the quality purchased and asking directions as to disposition of the goods, and no answer to the inquiry being made, could, when called upon by the railroad company to unload the car, take possession of the goods and pay only the reasonable market value therefor.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

Action begun in the civil court of Milwaukee county to recover the purchase price of one carload of mixed rags at four cents per pound. The defendants denied the rags were accepted under the contract of purchase, alleged they were

worth only two and three-fourths cents per pound, and tendered judgment for $254.20. It is admitted that the defendants on May 28, 1920, offered plaintiff four cents per pound f. o. b. Milwaukee for "good country mixed rags." On June 11, 1920, immediately upon receipt of the rags, the defendants telegraphed plaintiff: "Car rags rejected. All loose and skinned. Wire disposition." On the same day plaintiff wired defendants: "Telegram received, rejection not justified, rags neither all loose nor skinned, principally country stock as sold to you." Plaintiff the same day also sent defendants a scolding letter of protest and argument which ended with this request: "Upon receipt of this letter kindly wire immediately what you are going to do." On June 14, 1920, defendants wrote plaintiff as follows and inclosed this statement:

"Not having received satisfactory instructions in reply to our telegram asking for disposition of the car of rags, and being compelled by the railroad company to unload the car, we proceeded to do so, and inclosed you will please find statement showing return of car, together with our check for the amount due you as per inclosed statement."

To Greenberg Iron & Metal Co.,
St. Paul, Minn.

Rags.	*Weight.*	*Rate.*	*Amount.*
	35110	2.75	$965 52
Deposit received	$700 00		
To freight	9 26		
To car demurrage	2 06		
			711 32
			$254 20

The carload at four cents per pound amounted to $1,413.60, of which it was admitted $700 were paid. The civil court rendered judgment against the defendants for $254.20 less their costs, which judgment was affirmed by the circuit court less defendants' costs in said court, the judgment plaintiff appealed from being for $213.78.

For the appellant there was a brief by *Frank H. Hannaford,* attorney, and *Henry Mahoney,* of counsel, both of Milwaukee, and oral argument by *Mr. Hannaford.*

For the respondents there was a brief by *Morris Stern* and *Emil Hersh,* both of Milwaukee, and oral argument by *Mr. Hersh.*

VINJE, J. The jury in the civil court rendered a general verdict of $254.20 in favor of plaintiff. This is not challenged on the ground that it does not correctly find the market value of the rags, but plaintiff claims that there was no rejection of the rags and hence the contract price of four cents per pound governs. He contends that when defendants saw the rags and then went on and took possession of them it amounted to an acceptance under the contract; that they could not deprive plaintiff of the right to repossess himself of the rags, if they were rejected, and permit him to sell them at his own price.

Defendants claim that they did reject the rags; that they did so inform plaintiff by their telegram of June 11, 1920, and that they then offered plaintiff the right to repossess himself of the rags by asking him "Wire disposition," that he refused to do so, and hence under the provisions of the Uniform Sales Act applicable, namely, sec. 1684*t*—49 and sub. 1 (a), sec. 1684*t*—69, Stats., the defendants were justified in taking the rags and paying plaintiff the reasonable market value therefor. The above sections read respectively as follows:

"In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

"Where there is a breach of warranty by the seller, the buyer may, at his election:

"Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price."

It is unquestioned that defendants clearly and absolutely refused to receive the rags under the contract and that they likewise asked for disposition. Such notice and request was sufficient to apprise plaintiff that the rags would not be received under the contract. *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785. This notice was given on June 11th. They waited till June 14th before they exercised their option to receive the rags at their actual value. They were then called upon by the railroad company to unload the car and had to make some disposition of the rags. The time allowed was ample for plaintiff in which to make disposition of them if he chose to do so. The defendants acted strictly within their rights as declared by the Uniform Sales Act as above quoted and also in accordance with their rights as established in similar cases by our court. *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785; *Nicoll v. Modern S. S. Co.* 143 Wis. 545, 128 N. W. 72. Under the circumstances they were under no obligation to enter into a correspondence argument with plaintiff as to whether or not the rags came up to contract requirements. That they did not come up to such requirements was evidenced by the verdict, of which plaintiff does not complain. Hence it is a verity in the case that the rags materially failed to comply with the contract.

By the Court.—Judgment affirmed.

DURAS, Respondent, vs. KELLER and wife, Appellants.

December 16, 1921—January 10, 1922.

Judgment: Entry dismissing action: Vacation upon failure of party to comply with settlement: Judgment by consent: Nature.

1. An entry on the record reciting the settlement of an action, and, by consent of the parties, ordering it dismissed on the merits, though in form an order, was in fact a final judgment under sec. 2882, Stats., defining a judgment as the final determination of the rights of the parties.
2. A judgment by consent, though not based upon a verdict or findings of the court, operates to waive any defects in the pleadings or any irregularities or grounds of objection which would have constituted error if the judgment had been rendered upon a trial.
3. Where the parties to an action made a settlement under which defendant was to pay plaintiff a sum of money, and by consent of the parties the court entered a judgment dismissing the action on the merits, the court could not, without vacating such judgment, enter another judgment in plaintiff's favor for the amount alleged to have been agreed upon in the settlement, as under secs. 2882 and 2883 more than one judgment cannot be entered in an action.
4. The alleged failure of the defendant to carry out his promise upon which the settlement was made could not, in the absence of a stipulation to that effect, constitute ground for vacating the judgment of dismissal entered by consent.
5. A judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the court.
6. The agreement of the parties stands as a final disposition of their rights unless vacated or set aside in the manner provided by law.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed.*

This action was begun in the civil court of Milwaukee county to recover $2,000 damages alleged to have been sustained by reason of a defective walk upon the premises leased by the plaintiff from the defendants. Issue was joined, the matter was brought on for trial, a jury impaneled and sworn, and a recess was taken. The record then shows:

"Settlement effected. By consent of the parties, by their respective attorneys, it is ordered that the above entitled

action be and the same hereby is dismissed upon the merits without costs to either party.

"By the Court:
"WM. A. KLATE, Clerk.
"By Elizabeth Donnelly, Deputy Clerk."

The record shows that ten days later and on October 30th the plaintiff appeared by her attorney, the defendants appeared specially. The plaintiff filed an order to show cause why judgment should not be rendered in favor of the plaintiff and against the defendants in the sum of $375 and costs. The defendants, appearing specially, objected to the jurisdiction of the court on the ground that on October 20, 1920, the case was dismissed upon its merits without costs to either party. It further appears that the statement of M. H. Sell, Esq., who appeared for the defendants in the first proceeding, was taken by the court. No memorandum thereof, however, appears in the record. The court took the matter under advisement, and on November 5th overruled the objection to the jurisdiction, and on November 13th appears the following entry: "The court now finds for plaintiff and against defendants and assesses plaintiff's damages at the sum of $375 and costs," and ordered judgment accordingly. On November 15th the defendants gave notice of a motion to vacate and set aside the order so entered. The motion to set aside the order was denied and on November 22d judgment was entered in accordance with the order. From the judgment so entered in the civil court the defendants appealed to the circuit court for Milwaukee county, and from an order of the circuit court affirming the judgment of the civil court the defendants appeal to this court.

Henry G. Disch of Milwaukee, for the appellants.

For the respondent there was a brief by *Raymond J. Cannon* of Milwaukee, and oral argument by *M. L. Lueck* of Beaver Dam.

ROSENBERRY, J. It is the claim of the defendants that the court was without jurisdiction or authority to enter the judgment appealed from.

Before proceeding to consider that matter it will be necessary to dispose of some preliminary matters. The determination entered on October 20th, although in form an order, was in fact a final judgment as defined by sec. 2882, Stats., for the reason that it was a final determination of the rights of the parties in the action. Although not based upon a verdict or findings of the court, it was a judgment by consent and operated to waive any defects in the pleadings or any irregularities or grounds of objection which would have constituted error if the judgment had been rendered upon a trial. 23 Cyc. 729, and cases cited. No motion has ever been made to set aside that judgment and it has not in fact been set aside. The trial court held that by the order of November 13, 1920, the civil court, in effect, vacated the previous order. We are not advised upon what ground this conclusion is based. It would seem elementary that where there is one final judgment in an action there cannot be a second judgment in that action without having the first judgment vacated. Neither party asked to have the first judgment vacated, nor is any ground assigned upon which an order to vacate might be based. The order directing entry of the second judgment recites: "The plaintiff and defendants arrived at a settlement of said case in the sum of $375, which was to be paid by the defendants to the plaintiff; that immediately after said agreement was reached the attorney for the defendants, in open court and in the presence of the jury, stated to the court that the parties to this action had agreed upon an amicable settlement, and the court thereupon dismissed the jury and dismissed the case; that thereafter the defendants refused to pay the sum of $375 to the plaintiff, and the court, being advised of said fact and after a full hearing thereon by the parties and after being well and sufficiently advised in the premises," entered the order for judgment referred to in the statement of facts. The order to show cause was based upon the affidavit of plaintiff's at-

torney to the effect that "the defendants submitted a proposition of settlement of $375 to your affiant, and your affiant, after consultation with his client, accepted said offer in open court; that thereupon the jury was dismissed and the said defendants agreed to pay the sum of $375 on the following day; that thereafter the attorney representing the defendants notified your affiant that defendants had declined to pay pursuant to said terms in open court." The alleged failure of the defendants to carry out a promise to be performed at a subsequent time cannot, in the absence of a stipulation to that effect, constitute grounds for relief from the judgment of dismissal entered by consent at the time of the making of the promise. There is not the slightest intimation in the entire record that the defendants ever stipulated that judgment might be entered against them for the agreed amount. The original judgment not having been vacated and no grounds appearing upon which such relief might be properly granted to the plaintiff, the order for the second judgment and the entry thereof were erroneous.

Under the provisions of secs. 2882 and 2883, Stats., not more than one judgment can be entered in an action. *Loomis v. Besse,* 148 Wis. 647, 135 N. W. 123. A judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the court. *Holloway v. Durham,* 176 N. C. 550, 97 S. E. 486. The plaintiff having agreed that in consideration of the defendants' promise to pay $375 at a later time the action should be dismissed upon the merits, and such agreement having been given effect by the judgment of the court, it must stand as a final disposition of the rights of the parties in that action unless vacated or set aside in the manner provided by law.

The defendants claiming that their consent to the making of the promise was obtained by duress and misrepresentation, we make no intimation in any way as to the rights of

the parties except so far as they are necessarily involved upon this appeal.

By the Court.—Judgment of the circuit court affirming the judgment of the civil court is reversed, and cause remanded with directions to set aside and vacate the judgment entered November 22, 1920.

HERMAN ANDRAE ELECTRICAL COMPANY, Respondent, vs. COURTEEN, Appellant.

December 16, 1921—January 10, 1922.

Arbitration and award: Functions of arbitrators: When powers cease: Mistake: Effect on determination of controversy.

1. Under either a common-law or a statutory arbitration, when the arbitrators have met, heard the proofs, determined the controversy, reduced their decision to writing, and given notice thereof to the parties their power terminates and their functions cease.
2. The determination is binding and conclusive although by mistake one of the claims of one of the parties was omitted, and the arbitrators had no power to revise their decision to include such claim on the ground that they had determined the matter before the time had expired within which proofs might be offered, such time limit merely fixing the period beyond which they might not act but not preventing them from rendering a decision before the expiration of such period.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Plaintiff and respondent was a contractor in electrical supplies and equipment and as such furnished material and did work for the defendant at his summer home in Waukesha county.

Several payments were made during the progress of the work, and at the close a dispute arose as to the amount, if any, due plaintiff, defendant alleging that the work was improperly done.

Thereupon the parties entered into a written agreement for submission of the controversy to arbitration and award. The material portions thereof were to the effect that the attached complaint, being for work, labor, and material, should be considered the claim of the plaintiff, and the attached answer the defendant's position, and the two constitute the controversy between the parties so submitted. It provided for the appointment of one arbitrator by each and the method of the appointment of the third, which appointment was subsequently made. It also provided that the judgment or decision of two of the arbitrators should be binding and conclusive upon the parties. That the arbitrators should meet at a time and place to be by them agreed upon for the hearing of the proofs of the parties within a certain specified time, and that such meeting might be adjourned but not to a date later than thirty days from the date of the arbitration agreement, at the expiration of which time said parties should be deemed to have fully submitted the proofs in support of or in opposition to the respective demands. Provisions as to the taking of the oath by the arbitrators, the nature of the evidence to be considered, and the manner of submission of the same were also specified. It also provided: "All questions as to procedure and other matters in connection with the proceedings shall be determined by a majority of the arbitrators." It further provided for the form of making the award and the delivery of the duplicates thereof within forty days from the date of the agreement. It also stipulated that such agreement of submission should not in any case be deemed taken or held under or by virtue of the Wisconsin statutes and should be governed, except as therein provided, by the rules of the common law, and also: "it being the purpose of the parties hereto to pursue a liberal construction thereof, to the end that a reasonable adjustment of the differences of the parties hereto may be reached without unnecessary expense, annoyance, or delay."

Several stipulations were made subsequent to the signing of this agreement extending the time limits therein specified, the last of such being dated August 6, 1920. On July 17th and prior to the period fixed to which the parties were limited in the offering of their proof, there was a hearing had before the arbitrators and all the testimony offered that it was then understood either party intended to offer and arguments had by the respective counsel, no suggestion then appearing to have been made that either party had further evidence to offer, or that the hearing was not then understood by all to be completed.

On August 6th a written stipulation was made providing that the time within which the proofs of the parties shall be deemed to have been submitted was extended ten days from the 8th day of August, 1920, and that the time within which the arbitrators shall return their award was extended a like number of days from the time in which the same, but for such stipulation, would be otherwise returnable.

On August 9th the three arbitrators signed, in the agreed form, their decision finding the amount due plaintiff from defendant to be $1,400 as a full satisfaction and discharge of the respective claims of the parties. Copies thereof were duly delivered to the respective parties or their attorneys, and within due time payment was offered by defendant of the amount of $1,400 and tender of such amount thereafter maintained. The tender was rejected by plaintiff on the ground that the award of August 9th was premature. After the signing of the award of August 9th the defendant and the arbitrator appointed by him refused to participate in any further proceedings upon the ground that the authority of said arbitrators over the controversy had ceased upon the rendition of said award. The record is silent as to whether such refusal by defendant or his arbitrator was in writing.

After such position taken by defendant and his arbitrator, on plaintiff's motion the two other arbitrators received

further proof and before August 18th, that then being the last day on which the parties might offer proof; and then added to the award the sum of $300, and made and filed on August 28th a new award similar in form to the one of August 8th except that the amount was now $1,700 instead of $1,400.

Plaintiff commenced an action in the civil court of Milwaukee county upon the award of $1,700. Upon trial there that award was sustained and judgment given for plaintiff for the amount thereof, and on appeal it was affirmed by the circuit court. From the judgment so entered the defendant has appealed.

For the appellant there was a brief by *Fawsett & Smart,* and oral argument by *Edmund B. Shea,* all of Milwaukee.

A. W. Schutz of Milwaukee, for the respondent.

ESCHWEILER, J. From the stipulation as to the facts upon which this case was tried, it appears that the $300 difference between the $1,400 award of August 8th and the $1,700 award of August 28th arose on account of a certain motor which had been furnished by plaintiff to defendant. A reference was made to it in the defendant's answer in such manner that the arbitrators assumed, at the time of their making the first award, that the motor would be returned to the plaintiff and that defendant would assert no right to title or possession thereof, but no provision with reference to it was made in their first award. Subsequently the plaintiff called the arbitrators' attention to the fact that the defendant was then asserting title and right to possession of such motor, the value of which was considered to be $300, and upon such situation appearing before the two arbitrators, who assumed and continued to act in the matter, they then determined to add the value of said motor to the amount to be paid plaintiff.

It was expressly agreed between the parties that, except

as expressly provided in the agreement itself, the submission to arbitration was to be governed by the rule of the common law.

It is firmly established that under such a common-law arbitration agreement, when the arbitrators have met, heard all that the parties have to present, considered, determined, and reduced their decision to writing, and then complied with the provisions of the agreement as to giving proper notice thereof to the interested parties, their power as such arbitrators terminates and their functions cease. *Doke v. James,* 4 N. Y. 568; *Bayne v. Morris,* 1 Wall. (68 U. S.) 97; *Edmundson v. Wilson,* 108 Ala. 118, 123, 19 South. 367; *Hightower v. Georgia F. & O. Co.* 145 Ga. 780, 89 S. E. 827; *Hackney v. Adam,* 20 N. Dak. 130, 127 N. W. 519; 5 Corp. Jur. p. 75; Morse, Arbitration & Award, 226.

The same rule is recognized as applicable to a statutory arbitration. *McCord v. Flynn,* 111 Wis. 78, 90, 86 N. W. 668, citing *Flannery v. Sahagian,* 134 N. Y. 85, 31 N. E. 319, and *Herbst v. Hagenaers,* 137 N. Y. 290, 33 N. E. 315, also statutory proceedings.

In the case here presented opportunity was afforded to both parties, of which they availed themselves, of presenting proof and argument before the arbitrators. At the conclusion of such hearing it was tacitly assumed by all that there was no further evidence to be offered under the then agreement within which proofs might have been offered. Acting on the assumption that the respective parties were through with their presentation of the facts and arguments, the arbitrators in good faith proceeded to determine and did determine the matters before them. Through what now seems to have been a mistake in judgment on their part, no provision was made either for the return of or compensation for the motor furnished by plaintiff to defendant, but such a mistake nevertheless becomes binding upon all concerned, and the determination final and conclusive. *Eau Claire v. Eau Claire W. Co.* 137 Wis. 517, 524, 119 N. W.

555; *Travelers Ins. Co. v. Pierce E. Co.* 141 Wis. 103, 108, 123 N. W. 643; *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 503, 85 N. W. 485.

That the decision of the arbitrators was made before the time limited for offering proofs had expired was immaterial. Such limit merely fixed the period beyond which the arbitrators cannot act, but it does not prevent their disposing of the matter, the parties having been heard to completion on their respective sides, before the expiration of such period.

This view we take of the proceedings requires a reversal of the judgment of the circuit and civil courts and makes discussion of the other questions presented on this appeal unnecessary.

By the Court.—Judgment reversed.

THRONE, Respondent, vs. WANDELL, Appellant.

December 16, 1921—January 10, 1922.

Assault and battery: Surgical operation without patient's consent: Sufficiency of evidence: Damages.

1. A surgical operation without the consent of the patient, if he is in possession of his faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, is a technical assault.
2. In an action against a dentist for technical assault, plaintiff's testimony alone, though opposed to that of three witnesses for defendant, is *held* sufficient to support the finding of the jury that her teeth were extracted without her consent.
3. A judgment for $3,500 is excessive for the extraction, without plaintiff's consent, of six of her teeth, all but one of which had certainly been crowned and the other probably so, all of the teeth being broken down and the nerves dead so that they could not be filled and would, as time went on, have to be extracted. The damages should be reduced to $2,000, and the case is remanded for a new trial unless plaintiff consents to such reduction.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed, with directions.*

Action for damages for a technical assault.

The appeal is from a judgment entered January 25, 1921, in favor of the plaintiff for $3,500 damages and costs. The action was originally begun to recover damages from the defendant *L. A. Wandell* and one Dr. L. W. Baxter for personal injuries.

The plaintiff, an unmarried woman thirty-four years of age, and having been engaged as bookkeeper and accountant and also in conducting a cigar and candy business, called on Dr. Baxter, a dentist in the city of Milwaukee, to examine her upper teeth to ascertain the cause of a shooting pain which she suffered in her upper jaw. Dr. Baxter made an examination of the plaintiff but was unable to ascertain the cause of the pain, and thereupon handed the plaintiff a card which contained an outline of the teeth in both jaws, and on which card he drew a line through six of the upper teeth. Beneath the diagram, in print, were the words, "Kindly mark teeth to be extracted." It appears from the evidence that five of the six teeth indicated had been crowned and that there was no certainty as to whether or not the sixth tooth had also been crowned. The teeth that were crowned were the cuspid, lateral and central on the right side from the middle, counting back, and the central and lateral on the left side.

Dr. Baxter testified that the necessity for crowning a tooth arises when the tooth is so broken down that it has not enough life to fill. By "broken down" he meant decayed teeth and teeth where the nerves are dead. The apex of the tooth is at the end of the root, and shortly after the nerve of a tooth dies an inflammation will start at the apex, and if this is not properly attended to a pus sac will be formed. The pus from these sacs, when it enters the circulation, may produce neuralgia, rheumatism, blood poisoning, and many other ailments.

There is no dispute in the evidence that in making out the card in question and in sending the plaintiff to the defendant *Dr. Wandell,* Dr. Baxter had in mind the taking of an X-ray examination to determine the exact condition that the teeth were in, and he so informed the plaintiff.

The defendant *Wandell* was also a dentist, engaged in extracting teeth, and he also had in his office a specialist who performed X-ray examinations, and Dr. Baxter had previously sent patients to *Dr. Wandell* for such examinations.

The plaintiff claimed that she kept the card in her pocketbook for a period of about one month, without reading it, thinking that it contained an introduction to the defendant, *Dr. Wandell.* Plaintiff testified that upon arriving at *Dr. Wandell's* office she handed the card to the office girl, and upon being ushered into defendant's office she told him she came for an examination; that Dr. Baxter could not tell what the trouble was, after looking at the teeth, and that he sent her to the defendant to ascertain the trouble; that the defendant replied, "We'll find out what the trouble is;" that while she was seated in the dental chair *Dr. Wandell* administered gas, and that when she realized that gas was being administered she protested and gave evidence of remonstration, but that she was held tight in the chair until the gas had caused her to become unconscious, and upon regaining consciousness she ascertained that the six teeth had been extracted.

Dr. Wandell testified that after the plaintiff had entered his office he asked her what teeth were to be extracted, and that she told him the same were indicated on the card which she had presented to the office girl. This statement of *Dr. Wandell* is also corroborated by defendant's two assistants.

After the teeth had been extracted and upon plaintiff's regaining consciousness, she suffered and exhibited great distress. She also testified that *Dr. Wandell* immediately telephoned to Dr. Baxter and learned that the latter had sent her to him for an X-ray examination, and that he, the de-

fendant, expressed his regret at the mistake which had been made.

At the close of the testimony the court directed a verdict in favor of the defendant Dr. Baxter, and permitted the plaintiff to amend her complaint in accordance with the proof, so as to charge the defendant *Wandell* with the extraction of the teeth in question without her consent.

The case was submitted to the jury upon a special verdict, and the jury found that the defendant *Dr. Wandell* extracted the six teeth in question without plaintiff's consent, and the damages were assessed in the sum of $5,000.

Defendant's counsel thereupon moved for judgment notwithstanding the verdict, and, in the event of the denial of such motion, for an order changing the answer to the first question of the special verdict from "Yes" to "No," and for judgment in defendant's favor upon such verdict as so changed; and, in the event of the denial of the foregoing motions, for a new trial, mainly upon the ground that the verdict is unsupported by the evidence and because the damages are excessive. The court thereupon made an order denying the motions of defendant's counsel to change the answer of the jury as requested, and for judgment in defendant's favor, and for judgment notwithstanding the verdict, and ordered that the defendant's motion for a new trial be denied on condition that the plaintiff within ten days file a stipulation consenting to remit from said verdict the sum of $1,500 and to take judgment for the sum of $3,500 with costs. The plaintiff thereupon elected to take advantage of the court's offer, and filed in writing a stipulation remitting $1,500 from the verdict, and thereupon judgment was entered in favor of the plaintiff and against the defendant *Dr. Wandell* in the sum of $3,500 and costs.

Defendant's counsel assigns as error the denial of his motion for a directed verdict, and the refusal of the court to grant his motions after verdict, and the motion for a

new trial, because the verdict is contrary to the evidence and because the damages, even as reduced, are excessive.

Robert R. Freeman of Milwaukee, for the appellant.

For the respondent there was a brief by *Ray J. Cannon* of Milwaukee, attorney, and *M. L. Lueck* of Beaver Dam, of counsel, and oral argument by *Mr. Lueck.*

DOERFLER. J. "Where a patient is in possession of his faculties and in such physical health as to be able to consult about his condition, and where no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician." 30 Cyc. 1576, 1577. An operation without the consent of a patient under such circumstances constitutes a technical assault. *Mohr v. Williams,* 95 Minn. 261, 104 N. W. 12. See, also, cases in note in 1 L. R. A. N. S. 439–441.

The main question, therefore, involved in this case is: Were plaintiff's teeth extracted by *Dr. Wandell* without her consent? In order to pass upon this question it must be borne in mind that there is no dispute in the evidence that the plaintiff was advised by Dr. Baxter to obtain an X-ray examination and not to have the teeth extracted. It is true that the card made out by Dr. Baxter and handed to the plaintiff did not indicate anything with reference to an X-ray examination. On the contrary, the card indicated on its face that the teeth were to be extracted. The evidence is also undisputed that the plaintiff, before the extraction of her teeth, did not know what the card contained, and that she entered the office of *Dr. Wandell* for the purpose of having an examination made of her teeth so as to ascertain the cause of the pain. She testified positively that upon entering the defendant's office she told the defendant that she had been sent by Dr. Baxter for an examination to determine the cause of the pain, and she also testified that the defendant told her he would ascertain the cause. Right

here there is a very sharp conflict in the testimony of the plaintiff on one side and the testimony of the defendant and his two assistants on the other side. The defendant and his assistants testified that the defendant inquired of the plaintiff what teeth were to be extracted and that the plaintiff replied that it was indicated upon the card. This testimony of the defendant and his assistants is denied by plaintiff, and in view of the undisputed facts and circumstances in the case seems highly improbable, for if this testimony is to be believed, then knowledge was brought home to the plaintiff that she was not to submit to an examination but to an extraction of the teeth in question. Such testimony is not in harmony with the distress shown by the plaintiff immediately after ascertaining the fact that her teeth had been extracted. There is no contention on the part of the defendant that after plaintiff manifested her distress he called her attention to the claim made by him that she directed the extraction of the teeth indicated on the card. While in number the defendant has three witnesses opposed to the testimony of the plaintiff, standing alone it would appear from all the facts and circumstances in the case that plaintiff's testimony is not only highly credible, but that the jury was warranted in answering the question of the special verdict in the manner in which it did. The issue having been squarely presented to the jury by the first question in the special verdict, and there being credible evidence to support the answer of the jury thereto, such answer to such question must stand.

We now come to the error assigned based upon the amount of damages awarded by the jury. True, the court saw fit to make a material reduction in the damages. We are, however, convinced that the amount of damages in the reduced form is still greatly excessive. The teeth extracted were far from being perfect teeth. All but one of the teeth, to a certainty, had been crowned, and as to the sixth tooth

Dr. Baxter was of the opinion that it also had been crowned, but he was not entirely certain on the subject. These teeth were broken-down teeth. The nerves were dead so that the teeth could not be filled. It was only a question of time when the teeth would have had to be extracted and supplanted by some artificial means. Giving due credit to plaintiff's claim of distress and humiliation and pain, we are nevertheless firmly convinced that the highest amount which the court ought to have permitted to stand in the judgment by way of damages is the sum of $2,000.

The judgment of the circuit court is therefore reversed, and the case remanded for a new trial unless defendant, within twenty days after receiving written notice of the filing of the *remittitur* in the court below, serves upon plaintiff's counsel consent in writing to judgment in plaintiff's favor for the sum of $2,000 and costs as heretofore taxed. In case such consent as indicated is filed, judgment may be rendered upon application of plaintiff to the court having jurisdiction of the action, without notice.

By the Court.—It is so ordered.

CORSCOT, Plaintiff in error, vs. THE STATE, Defendant in error.

December 16, 1921—January 10, 1922.

Criminal law: Summary exceptions: Scope of review: Questions challenging the sufficiency of the evidence.

1. Sec. 4720, Stats., providing that any person convicted of an offense before the circuit court may reduce to writing in a summary mode exceptions to the ruling of the court on matters of law, does not bring up the whole case for review. Exceptions—in this case to an order refusing a nonsuit, to an order denying a new trial, and to a denial of a motion in arrest of judgment,—although proper in form, which raise the question of the sufficiency of the whole evidence to

sustain a conviction, cannot be considered; nor will an exception to the charge of the court, which standing alone was correct, be considered if it involves the whole record and a recourse to all the evidence in the case.

2. Under sec. 4720, Stats., as to exceptions before sentence, there must be incorporated in the exceptions so much of the evidence or proceedings upon the trial as is relied upon to support the claim of error.

EXCEPTIONS from the superior court of Dane county: AUGUST C. HOPPMANN, Judge. *Overruled and dismissed.*

Exceptions allowed under sec. 4720, Stats. 1919, to review the ruling of the superior court of Dane county in the above entitled action. The defendant's exceptions are: (1) to the order of the court denying his motion for a nonsuit; (2) to the order of the court overruling his motion for a new trial made upon the judge's minutes; (3) to four portions of the judge's charge set out in the exceptions; and (4) to the order of the court denying his motion in arrest of judgment for the reasons stated in said motion.

Rufus B. Smith of Madison and *J. M. Clancey* of Stoughton, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker.*

VINJE, J. Defendant's exceptions 1, 2, and 4 cannot be considered because they do not conform to the provisions and intent of sec. 4720, Stats. That section provides:

"Any person who shall be convicted of an offense before the circuit court, being aggrieved by any opinion, direction or judgment of the court in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions being reduced to writing in a summary mode and presented to the court at any time before the end of the term, and if found conformable to the truth of the case, shall be allowed and signed by the judge, and thereupon all further proceedings in that court shall be stayed, unless it shall clearly appear to the judge that such exceptions are friv-

olous, immaterial or intended only for delay; and in that case judgment may be entered and sentence awarded in such manner as the judge may deem reasonable notwithstanding the allowance of such exceptions."

It was not intended that such exceptions as are there mentioned and "reduced to writing in a summary mode" should bring up the whole case as is here done, especially by the first exception to the court's refusal to grant a nonsuit, by which we understand the court's refusal to discharge the defendant at the close of the state's case because of lack of proof of guilt. This is practically the only exception argued either orally or in the briefs. Exceptions 2 and 4 also rest upon an alleged lack of evidence of guilt.

The exceptions to the charge of the court conform to the statutory practice. The portions excepted to are set out in the exceptions, and from the exceptions alone, as the statute intended, we can determine their correctness. They are in this case, however, excepted to, not because they are incorrect in themselves, but because it is claimed there is no sufficient evidence of guilt to which they can apply, and hence they inferentially and erroneously informed the jury that they might convict upon the evidence before them. Such being defendant's claim, the exceptions, though proper in form, raise the question of the insufficiency of the whole evidence to sustain a conviction. This cannot be done under the statute (*State v. Clifford*, 58 Wis. 113, 16 N. W. 25) because it involves an examination of the whole record and a recourse to all the evidence in the case. Exceptions under this section do not require the settlement of a bill of exceptions or the sending up of the whole record. They do not stay proceedings in the trial court if that court deems them frivolous and sees fit to proceed.

The subject is treated so fully by Mr. Justice ORTON in *State v. Clifford*, 58 Wis. 113, 16 N. W. 25, that little need be here said except to call attention to that case and the cases therein cited, where it is held that the exception that

the verdict is against the evidence cannot be allowed, nor an exception to the sustaining of a demurrer, and that no evidence should be embraced in the exception except what is necessary to show the error. This implies that there must be incorporated in the exceptions so much of evidence or proceedings upon the trial as is relied upon to support the claim of error. That was not done in this case as to exceptions 1, 2, and 4, and, as has been pointed out, exception 3, though proper in form, is in each case bottomed upon a lack of evidence, and hence it cannot be considered upon the real merits urged but only upon the correctness of the charge standing alone. So considered, each instruction is correct and the exceptions thereto must be overruled.

To permit the whole case to come up here on exception as is here attempted to be done would be to substitute exceptions for a writ of error and then if defeated to come here again upon a writ of error and argue the selfsame questions, for sec. 4723 specifically permits a writ of error in a case where exceptions have been overruled. See, also, *State v. Law,* 150 Wis. 313, 136 N. W. 803, 137 N. W. 457, to the same effect.

It is unfortunate for the parties hereto that the merits cannot be considered, since the whole case is here and the questions have all been briefed and argued. But the court deems the question of practice so important that the interests of the parties must yield thereto. If the court considered the merits of the present case it ought to do so in other cases brought here in the same manner, and the result would be to subvert the statutory purpose of sec. 4720, and in fact to allow each convicted defendant two writs of error, one before sentence and one after. Such practice cannot be tolerated.

By the Court.—Exception 3 is overruled, and exceptions 1, 2, and 4 are dismissed.

STATE EX REL. PLUNTZ, Respondent, vs. JOHNSON, Appellant.

September 21, 1921—February 7, 1922.

Sheriffs: Hold-over officers: Eligibility for succeeding term: Appointive and elective sheriffs: Term: Constitutional law.

1. A sheriff, whether elected or appointed, holds his office until his successor is elected and qualified.
2. Under sec. 4, art. VI, Const., providing that sheriffs shall be ineligible for two years next succeeding the termination of their offices, the period of ineligibility is the term succeeding that for which the sheriff was elected.
3. Thus, where J. was appointed to the office of sheriff during 1917 for the unexpired portion of the term ending January, 1919, and under such appointment held the office until July, 1920, it is *held* that J. was not ineligible to election for the term beginning in January, 1921, even though he held such office nearly four out of four and a half years.

APPEAL from an order of the circuit court for Barron county: W. R. FOLEY, Circuit Judge. *Reversed.*

This is an action in the nature of *quo warranto,* brought upon the relation of *Herman Pluntz,* a resident and taxpayer of Barron county, to oust the appellant from the office of sheriff of that county. A demurrer to the answer was sustained, and from that order the defendant appealed.

For the appellant there was a brief by *Wylie & Sutherland* of Madison, and oral argument by *F. M. Wylie.*

Spencer Haven of Hudson, for the respondent.

The following opinion was filed October 18, 1921:

OWEN, J. The answer alleges that "during the year 1917 defendant was appointed to the office of sheriff of Barron county for the unexpired portion of the term commencing on the first Monday of January, 1917; by virtue of such appointment, and while holding the said office for the unexpired portion of the said term and until his successor for the term commencing on the first Monday of January, 1919, should qualify, defendant performed the duties of sheriff

of Barron county until the month of July, 1920, when his successor for the term commencing on the first Monday of January, 1919, qualified; defendant received a majority of the votes cast at the general election in November, 1920, for the office of sheriff of Barron county for the term commencing on the first Monday of January, 1921, and duly qualified for the said office for the said term, and now holds the same by virtue of such election and qualification."

The averment that the defendant during the year 1917 was appointed to the office of sheriff of Barron county for the term ending on the first Monday in January, 1919, and that he continued to act as such sheriff until July, 1920, at which time his successor qualified, will be noted. If any curiosity should arise concerning the extraordinary length of time intervening between the 1st day of January, 1919, and the time when his successor qualified, the occasion thereof will be explained by a reference to the case of *State ex rel. Knutson v. Johnson,* 171 Wis. 521, 177 N. W. 899. The facts are that *Johnson* was elected to succeed himself as sheriff for the term beginning on the first Monday in January, 1919; and after the decision of this court holding him ineligible to such election, by reason of which a vacancy existed in the office, an appointment to fill the vacancy was made in July, 1920. Such appointee was the successor who qualified in July, 1920. This recital in no manner affects the legal effect of the answer. That document sets forth the situation with legal definiteness, but with a barrenness calculated to excite curiosity, which we feel the above statement may satisfy.

The question presented is whether the defendant, having served under his appointment, made during the year 1917, until July, 1920, was eligible to election for the term commencing on the first Monday of January, 1921. Sec. 4 of art. VI of the constitution provides that "sheriffs shall hold no other office, and be ineligible for two years next succeeding the termination of their offices." If we fix the date

upon which the defendant's office terminated, it can be determined whether he was eligible for election to the office for the term beginning on the first Monday of January, 1921, by a simple mathematical calculation.

It is the defendant's contention that his office terminated on the first Monday in January, 1919. If he had been elected to the office such would have been the case. The section of the constitution already alluded to provides that sheriffs and other county officers shall be chosen by the electors of the respective counties once in every two years. This plainly fixes the term of county officers at two years. The constitution makes no provision as to when such terms shall begin and end, and consequently the statute has provided that they shall begin and end on the first Monday in January in each odd-numbered year. The constitutional provision under consideration does not provide that those elected to the office of sheriff shall hold over until their successors are elected and qualified. The general trend of judicial decisions in this country is to the effect that where the written law contains no provision, either express or implied, to the contrary, an officer is entitled to hold his office until his successor is elected and qualified. While the constitutional provision under consideration provides that sheriffs and other county officers shall be elected for two years and is silent as to their holding over until their successors are elected and qualified, it is also provided in the same section that "all vacancies shall be filled by appointment, and the person appointed to fill a vacancy shall hold only for the unexpired portion of the term to which he shall be appointed *and until his successor shall be elected and qualified.*" In view of the express provision that those appointed to fill a vacancy shall hold until a successor shall be elected and qualified, the conclusion is irresistible that such was not the intention with reference to those who are elected. This conclusion is strengthened, so far as it applies to the office of sheriff, by the provision that sheriffs shall be "ineligible

for two years next succeeding the termination of their offices." So far as the office of sheriff is concerned, at least, the constitutional purpose seems to have been to constitute an elective term of two years and no more. Such being the term fixed by the constitution, it may not be enlarged by legislative enactment, an effect ascribed by appellant's counsel to sec. 59.12, Stats. So we come to the conclusion that if the defendant had originally come into the office by an election, his office would have terminated on the first Monday in January, 1919. That was the end of the term as fixed by statutory enactment supplementing the constitutional provision upon the subject. As one who is elected to the office of sheriff does not hold over, the end of the term for which he is elected necessarily marks the termination of his office.

But, as we have seen, the constitution provides differently with reference to appointments to fill vacancies in the office of sheriff, if not all other county offices. In such cases the appointment is not only for the unexpired portion of the term, but until a successor shall be elected and qualified. The term for which *Johnson* was originally appointed, therefore, did not necessarily end on the first Monday of January, 1919. He was appointed to hold until that time *and* until such further time as his successor shall be elected and qualified. He himself was elected as his successor. He was ineligible for the office, and, while he pretended to qualify and act under such election, such election furnished him no title thereto. He did have a good title to the office by reason of his appointment, which continued him in office until an eligible successor should be elected or appointed and should qualify therefor. This did not occur until July, 1920. His office, therefore, did not terminate until July, 1920, at which time his ineligibility attached disqualifying him from holding the office for two years thereafter. It follows that he is not eligible to hold the office for the term

beginning on the first Monday of January, 1921, and that the demurrer to the answer was properly sustained.

Attorneys for appellant stress the following language used in the opinion in *State ex rel. Knutson v. Johnson,* 171 Wis. 521, 524, 177 N. W. 899:

"By such appointment it becomes the appointee's office, and the expiration of the two-year period succeeding the election of the predecessor is as much the termination of the appointee's office as it would have been of the official elected had he continued therein. No other term than such particular two-year term is recognized in the constitution. It is the one and same term no matter who the incumbent."

From this it is argued that appellant's term of office under and by virtue of the appointment terminated on the first Monday of January, 1919, and, upon a superficial consideration, there may appear to be a conflict between the language quoted and the statements herein made. But it should be remembered that judicial language should always be limited to the subject under consideration. The question there was when the term, that is, the fixed term, for which the defendant was originally appointed, ended. The fixed term for which he was appointed ended the first Monday in January, 1919. Until that time he had an absolute right to the office the same as though he had originally been elected thereto. Although, as held in that opinion, he legally held over, there was nevertheless a vacancy in the office, and his title thereto after the expiration of the fixed and definite term was defeasible and subject to be terminated whenever an eligible and lawfully elected or appointed successor should qualify therefor. His appointment was really for two periods of time: one was to cover the unexpired portion of the fixed term, and the other for such time thereafter as might elapse before an eligible successor should qualify for the office. The first period was fixed and definite. The latter period was indefinite and uncertain.

While he held the office for more than eighteen months after the expiration of the fixed term under and pursuant to his appointment, he was merely filling a vacancy in the office until some eligible person qualified therefor. While the original term for which he was appointed expired on the first Monday in January, 1919, his office did not terminate until the month of July, 1920, and his ineligibility did not attach until that time.

By the Court.—Order affirmed.

On December 13, 1921, a motion by appellant for a rehearing was granted, and on January 16, 1922, briefs were submitted on reargument.

The following opinion was filed February 7, 1922:

OWEN, J. In the original opinion filed in this case it is held that an elective sheriff does not hold beyond his term until his successor qualifies. More mature reflection, occasioned by the motion for a rehearing, persuades us that this conclusion was reached without giving sufficient consideration to the history of sec. 4 of art. VI of the constitution, as well as the acts of the legislature constituting a legislative construction thereof, and a number of decisions of this court according judicial acquiescence to such legislative construction. It now appears that in our original consideration of the case undue significance was accorded to that part of the constitutional provision declaring that one appointed to fill a vacancy shall hold office "until his successor shall be elected and qualified." Without taking into consideration the history of this provision, the fact that the framers of the constitution specifically provided that one appointed to fill a vacancy should hold until his successor is elected and qualified, there being no similar provision with reference to elective officers, naturally led to the conclusion that it was not intended that an elective officer should hold beyond his term.

As this section originally appeared in the constitution, it

provided that "sheriffs, coroners, registers of deeds, and district attorneys shall be chosen by the electors of the respective counties, once in every two years, and as often as vacancies shall happen." This provision necessitated an election whenever a vacancy occurred in one of those offices, and this court was forced to hold in *Att'y Gen. ex rel. Schantz v. Brunst,* 3 Wis. 787, that such an officer held his office for a term of two years, which necessitated a special election for his successor at the end of the term. This brought about an irregular occurrence of elections, to dispense with which, as well as to provide for biennial general elections, an amendment to the constitution was adopted in 1882 amending certain provisions thereof, among which were sec. 4 of art. VI and sec. 12 of art. VII. By the amendment to sec. 4 it was provided that vacancies occurring in the offices therein named should be filled by appointment, and that the person appointed should hold for the unexpired portion of the term. Sec. 12 of art. VII relates to the office of clerk of the circuit court. As originally adopted it provided that "in case of a vacancy, the judge of the circuit court shall have the power to appoint a clerk, until the vacancy shall be filled by an election," and that the clerk thus "elected shall hold his office for a full term." As amended it provides that a vacancy occurring in the office of the clerk of the circuit court shall be filled by appointment, and while it is not specifically provided that such appointee shall serve for the unexpired term, such undoubtedly was the purpose of that provision.

It is contended by appellant that the specific provision of the amendment to sec. 4 of art. VI that "all vacancies shall be filled by appointment, and the person appointed to fill a vacancy shall hold only for the unexpired portion of the term to which he shall be appointed and until his successor shall be elected and qualified," was inserted because the application of the hold-over doctrine to appointees to fill vacancies was not then well established, if in fact it has any

application even at this time. This contention is not without force. But whether such was the purpose of the quoted language of the amendment, it is certain that it is not entitled to much significance in construing the original portion of that section. Whether it was the purpose of the framers of the constitution that sheriffs and other officers mentioned in sec. 4 of art. VI should hold office until their successors are elected and qualified must be determined from a construction of the original language independent of the amendment. As stated in the original opinion, the general trend of decisions in this country is to the effect that, where the written law contains no provision either express or implied to the contrary, an officer holds his office until his successor is elected and qualified. This rule of construction prevents the inconvenience and annoyance resulting from the suspension of official functions because there is no officer authorized to discharge such functions. As the section was originally adopted, there is nothing which negatives a purpose on the part of the framers of the constitution that the officers mentioned therein should hold until their successors shall be elected and qualified, and the reasons assigned for the contrary ruling in the original opinion lose much of their force when it is understood that the language relied upon to negative such an intent was introduced into the constitution more than thirty years after its adoption.

We not only fail to discover anything in the section as originally adopted which negatives the right of the officers there mentioned to hold over their terms and until their successors shall be qualified, but evidence that such was the purpose of the framers of the constitution appears by the fact that sec. 59.12 of the Statutes, which provides that the county officers shall hold their offices until their successors qualify, first appeared in the statutes of this state as sec. 141 of ch. 10 of the Revised Statutes of 1849. This amounts to contemporaneous legislative construction of this constitutional provision, which construction is entitled to

great deference. *Dean v. Borchsenius,* 30 Wis. 236; *State ex rel. Hudd v. Timme,* 54 Wis. 318, 11 N. W. 785; *Coutant v. People,* 11 Wend. 511; *People v. Green,* 2 Wend. 266. The constitutionality of this statute has never been challenged, and has apparently been accepted and acquiesced in by all departments of state government as establishing the tenure of office for all county officers. Furthermore, this court has expressly held in at least three cases that county officers hold their offices until their successors are elected and qualified. In *State ex rel. Prince v. McCarty,* 65 Wis. 163, 26 N. W. 609, it was said that a county clerk having been elected to the office had the right to hold it until his successor was qualified. In *State ex rel. Warden v. Knight,* 82 Wis. 151, 50 N. W. 1012, 51 N. W. 1137, it was said concerning a county treasurer that "the tenure of office of the respondent, as the incumbent of the office of county treasurer at the time the relator was elected, was until the first Monday of January next thereafter, and until his successor should be qualified." And in *Sheboygan Co. v. Gaffron,* 143 Wis. 124, 126 N. W. 542, this court said that the superintendent of schools is a county officer, and his term of office, like that of other county officers, continues for two years and until his successor is qualified. As the terms of all county officers are fixed by sec. 4 of art. VI, whether the offices are created by statute or by the constitution, the decisions just referred to apply as well to those officers specifically mentioned in said sec. 4 as to the officers whose offices are created by the statute.

Sec. 12 of art. VII of the constitution created the office of clerk of the circuit court. As originally adopted it simply provided that this officer, "shall hold his office for two years, subject to removal, as shall be provided by law." Under this provision it was said in *State ex rel. Allen v. Lyon,* 45 Wis. 246, decided in 1878, that "as a matter of course the defendant would hold the office until the commencement of his successor's term;" and prior to the adoption of our con-

stitution it had been decided in New York, from which state, it was said in *Att'y Gen. ex rel. Schantz v. Brunst,* 3 Wis. 787, sec. 4 of art. VI was taken, that a sheriff held his office until his successor was elected and qualified. *Curtis v. Kimball,* 12 Wend. 275 (decided in 1835); *Hinds v. Doubleday,* 21 Wend. 223 (decided in 1839).

From these considerations, which were not called to our attention upon the original argument, we are now convinced that our former conclusion proceeded from an erroneous assumption. It therefore follows that, with respect to holding over, the elective and the appointive sheriff are on the same basis. The appointive sheriff holds over by virtue of the express provisions of the constitution. The elective sheriff holds over by virtue of the statutory provision, if indeed such would not be the case under rules of construction independent of the statute.

We now come to a reconsideration of the question whether a sheriff, by the act of holding over, becomes disqualified from again holding the office for a period of two solar years. If such be the case, then it is apparent that a sheriff who holds over for a day by reason of the failure of his successor to qualify, circumstances over which he has no control, becomes ineligible for the next succeeding term. Such a rule would not only be harsh, and in many instances deprive the electors of an official of their choice, but it would seem to bear no relation to the obvious purpose of the disqualifying provision of the constitution. That provision was no doubt inserted because it was thought the sheriff had extraordinary powers which could be exercised for the purpose of influencing the electors and thereby perpetuating himself in office. As was said by Mr. Chief Justice DIXON in *State ex rel. Ames v. Southwick,* 13 Wis. 365: "We are certain that they considered the allurements of an immediate re-election to the office of sheriff too powerful even for the virtue and manhood of a sovereign." In *Coutant v. People,* 11 Wend. 511, the chancellor refers to

the proceedings of the constitutional convention of New York relating to a similar disqualifying provision in the constitution of the state, wherein it was said by one of the delegates that he should be "opposed to the election of sheriffs by the people if the elections were to be annual, and the sheriff to attend the polls with executions in his pocket, and deputies at his heels." "But give him three years for the duration of his office, and make him ineligible for the next three years, so that he may not suspend the collection of debts with a view to his re-election." And again the same delegate said: "It is proposed that the sheriff shall hold his office for a given time, and then be ineligible for a time; by which means he cannot turn his influence while in office to the purposes of a re-election."

If such were the motives which influenced the adoption of the disqualifying provision, it is apparent that the purpose of the provision was to prevent the sheriff from using influences at his command to perpetuate himself in office. It is true the constitutional provision under consideration provides that he shall be disqualified for the next two years. But does not this mean the next term? The same section fixes the term of the sheriff at two years. It provides that he shall be disqualified for the next two years. Manifestly it would have been more definite to have created the disqualification for the next term. But when the obvious purpose of the disqualifying provision is considered, and it appearing that the term of the sheriff is fixed at two years, is not the disqualifying provision of two years to be construed as synonymous with the term of the office? Such a construction will not detract from the virtue of the provision. Its obvious purpose will be conserved, public business will not be suspended, as when one elected to office delays in qualifying therefor, nor will one elected to the office of sheriff be disqualified for four instead of two years by virtue of circumstances over which he has no control. This construction gives full force to the purpose which prompted

the adoption of the disqualification, is more conducive to the public welfare, and minimizes the restraint upon the right to hold office as well as the choice of electors for office.

Upon more mature consideration, it would seem that a construction of sec. 4 of art. VI in conformity with the foregoing views is not only the more reasonable, but has the support of authority, affirms the practical construction accorded to it by all departments of state government throughout the years of our statehood, and better promotes the public welfare. We therefore hold that one elected to the office of sheriff retains the office until his successor is elected and qualified, and that the two-year period of disqualification mentioned in the constitution relates to, and is synonymous with, the term of the office next succeeding that for which the sheriff is elected or appointed. It follows that although the appellant, *Johnson,* held over for a period of a year and a half, he was nevertheless qualified for election to the office of sheriff for the term beginning on the first Monday in January, 1921; that the complaint states no cause of action; and that the demurrer thereto should have been sustained.

This permits the appellant to hold the office of sheriff for a period of about four out of four and a half years. This seems like trifling with the constitutional provision we have been considering, and we are not disposed to deny that this eventuality had its influence upon our original consideration of this case. It is a familiar saying that hard cases make bad law, and as we now view the matter our effort to prevent what seemed a defiance of constitutional provisions on the part of appellant would have resulted in an unfortunate construction of the fundamental law if our original decision were permitted to stand. The circumstances which have permitted appellant to enjoy what seems an unconstitutional tenure of office are peculiar, and are due somewhat to the delays incident to the administration of justice, as it

required a year and a half to obtain a decision of this court that he was disqualified for holding the office during the term succeeding that for which he was appointed. Although this seeming flouting of constitutional provisions may be resented, some solace is offered in the thought that the result has been in nowise offensive to a majority of the electors of Barron county, as the appellant was their deliberate choice, uninfluenced by any powers of persuasion appertaining to the office of sheriff, he not being an incumbent of that office when elected for the present term.

But however this may be, it is more conducive to justice to intrench sound and abiding principles in our jurisprudence by which justice is to be declared throughout the years, even though the immediate result may not be viewed with favor, than to accommodate settled and well considered principles to immediate necessities, so that during the course of time they become so warped and distorted that the citizen has no rule or guide for lawful conduct. It is more important that fixed rules of conduct be maintained, so that the individual may know when he is acting within the law, than to impair such rules in an effort to administer justice in accordance with the views of the judge in each individual case, resulting in a system of jurisprudence where, in order to know what he may lawfully do, the individual must conjecture concerning the abstract notions of justice which may be entertained by the judge before whom his case will be tried. It is believed the conclusion now reached in this case announces a construction of the constitutional provision involved that embodies good public policy and fully accomplishes the purpose of its adoption.

By the Court.—The former judgment entered herein is vacated. The order appealed from is reversed, and the cause remanded with directions to sustain the demurrer.

BECKER, Appellant, vs. GREEN COUNTY, Respondent.

September 22, 1921—February 7, 1922.

Officers: Ouster by conviction of infamous crime: Recovery of salary on reversal of judgment: Statutes: Revision: Consolidation: Statute enacted after conviction: Questions not litigated: Waiver.

1. A public officer who had been erroneously convicted of a crime which works an ouster from his office cannot under the common law, upon reversal of such erroneous judgment, recover salary for the time during which he was excluded from the office, his rights of recovery, if any, being by virtue of statutory law.
2. An "infamous crime" within the meaning of sec. 3, art. XIII, Const., making a person convicted thereof ineligible to hold public office, and sec. 17.02, Stats. 1917, providing for a vacancy in office upon conviction of an officer of an "infamous crime," is a crime punishable by imprisonment in the state prison.
3. A county judge convicted under the federal espionage act of June 15, 1917, and thereby disqualified from holding office by sec. 3, art. XIII, Const., and ousted from his office by sec. 17.02, Stats. 1917, was not, on reversal of such conviction, following stay of sentence, entitled to salary for the period of time he had been so ousted, under sec. 4935, providing that the office of a public officer who had been convicted and sentenced to state prison shall be deemed vacated from the time of commitment to prison and that the officer, on reversal of the judgment, shall be restored to office with all its rights and emoluments.
4. A revision of the statutes is more than a restatement of the substance thereof in different language, and implies their reexamination and may constitute a restatement of the law in a corrected or improved form, in which case the revision may be with or without material change, and is substituted for and displaces and repeals the former law as it stood relating to the subjects within its purview.
5. Statutes creating new rights are not construed as applying to past wrongs unless plainly so intended, and in case of doubt or ambiguity they are construed as prospective only.
6. Sec. 14, ch. 362, Laws 1919, providing for the consolidation of sec. 4935, Stats. 1917, with other sections to constitute sub. (5), sec. 17.03, which took effect after plaintiff was sentenced but before judgment of conviction was reversed, and pro-

viding also for the restoration to office of a convicted public officer on reversal of judgment, does not entitle an officer who has been ousted from office by conviction under laws then existing to restoration of office, the legislature having no more right to restore an ousted officer than to provide for the induction of an officer into office in the first instance.

On rehearing:

7. The question whether plaintiff was entitled to salary for the period he served as county judge after his conviction and before his successor qualified and assumed the office, not having been presented to the court during the trial, cannot be urged as a ground for a new trial or for a reversal of the judgment; but, without expressing an opinion on the question, it is *ordered* that the judgment in the case be without prejudice to plaintiff's right in respect to the salary for such period and will not be *res adjudicata* in proceedings instituted for a recovery thereof.

ESCHWEILER and DOERFLER, JJ., dissent.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action by plaintiff to recover his salary as county judge of *Green County* during the time he was suspended from that office by reason of his erroneous conviction under the federal espionage act. On the 6th day of August, 1918, the plaintiff was the county judge of *Green County* for the term ending January 5, 1920. On that date he was convicted in the United States court for the Western district of Wisconsin of a violation of the espionage act (Act of Congress approved June 15, 1917) and sentenced to imprisonment for three years. Execution of said sentence was stayed pending prosecution of a writ of error to the United States circuit court of appeals. In October, 1920, and after the expiration of the term of office for which plaintiff had been elected, the circuit court of appeals reversed the judgment and conviction, holding that as a matter of law the evidence did not justify conviction of plaintiff. Plaintiff was at no time committed to prison under said judgment and conviction. On September 19, 1918, the governor of the state of Wisconsin appointed a successor to said *Becker*

to fill the vacancy in said office of county judge, caused by the conviction of said plaintiff as aforesaid. This action is brought to recover his salary as county judge from the time he was ousted from the office until the end of the term. The trial court rendered judgment in favor of the defendant, from which the plaintiff brings this appeal.

For the appellant there was a brief by *Wheeler & Witte* of Milwaukee, and oral argument by *Lyman G. Wheeler.*

For the respondent there was a brief by *H. N. B. Caradine* of Monroe and *Olin, Butler, Thomas, Stebbins & Stroud* of Madison, and oral argument by *Mr. H. L. Butler, Mr. R. M. Stroud,* and *Mr. Caradine.*

The following opinion was filed October 18, 1921:

OWEN, J. No mistake-proof system of administering justice has yet been devised, nor is it likely to be as long as the element of human judgment enters into the scheme. The innocent will be punished and the guilty will escape. We contemplate this fact with regret, but nevertheless the fact exists. No one is in a position to realize this better than the plaintiff himself, who during many years has occupied an honorable and prominent position in the judicial system of this state. Although he has suffered most grievously by reason of the error committed, he has no doubt faced his misfortune as philosophically as one may be expected to do who smarts under the sense of grievous wrong.

The question now presented is whether the written law of this state provides that a public officer who has been erroneously convicted of crime which works an ouster from his office may, upon a reversal of such erroneous judgment of conviction, recover the salary during the time he was so excluded therefrom. If such recovery can be had it must depend upon statutory law, as it is not recoverable under any principle of the common law. This court has held, in harmony with the great weight of judicial authority, that a *de*

jure officer cannot draw from the public treasury a salary attached to the office that has been paid to a *de facto* officer who wrongfully excluded the *de jure* officer therefrom. *Clausen v. Fond du Lac Co.* 168 Wis. 432, 170 N. W. 287. This is on the theory that the public ought not to be compelled to pay two salaries, and that as the disbursing officers ought not to be compelled to decide for the municipality which is rightfully entitled thereto, payment by them to the one in possession of the office should be held to discharge the public from further responsibility in the matter.

Upon the oral argument counsel for appellant cited to our attention the cases of *Fitzsimmons v. Brooklyn,* 102 N. Y. 536, 7 N. E. 787; *Newberry v. Smith,* 157 Mich. 181, 121 N. W. 746; *Ward v. Marshall,* 96 Cal. 155, 30 Pac. 1113; *McEvers v. Boyle,* 25 Cal. App. 476, 144 Pac. 308, a consideration of which, he thought, disclosed the error of his former assumption that the right of appellant to recover must be referred to statutory law. In the first two cases city police officers were removed, in form, by administrative officers vested with authority to remove police officers under certain circumstances, which pretended removal had been adjudged void. It was held that the police officers were entitled to recover their salaries during the period of their unlawful suspension. In *Ward v. Marshall,* 96 Cal. 155, 30 Pac. 1113, the plaintiff, a justice of the peace, was convicted of wilful misconduct in office and, as a part of the judgment of conviction, was removed from his office, which judgment was reversed upon appeal. It was held that he was entitled to the salary of his office during the time he was suspended from the performance of his duties by the erroneous judgment of the trial court. In *McEvers v. Boyle,* 25 Cal. App. 476, 144 Pac. 308, it was held that one who has been appointed to the office of sealer of weights and measures created by an ordinance of the city of San Francisco was entitled to the salary of the office during a period in which he was prevented from performing the duties thereof

to test the constitutionality of the ordinance. We think the present case is clearly distinguishable from those cases. In those cases there never was a lawful removal, while in this case, as will presently appear, the removal was lawful, even though erroneous. The removal in this case being lawful, no reason appears for compelling a double payment of salary from the public treasury by that branch of the law which denies to a *de jure* officer the salary which has been paid to a *de facto* officer during the time he has been unlawfully excluded from office. We therefore think that the original impression of counsel to the effect that statutory law must be found to entitle plaintiff to a recovery was in accordance with the law on the subject.

Sec. 3, art. XIII, of the constitution provides that "no person convicted of any infamous crime in any court within the United States . . . shall be eligible to any office of trust, profit, or honor in this state." By sec. 2, ch. 11, Revised Statutes of 1849, it was provided that "Every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: . . . 5. His conviction of any infamous crime, or of any offense involving a violation of his official oath." This provision has continued in the statutes without change until 1917, and is found as a part of sec. 17.02 of the statutes of that year. The constitutional provision disqualified the plaintiff from further holding the office of county judge, and the statutory provision referred to expressly provided that his office should become vacant upon his conviction of any infamous crime. We have no doubt that the crime of which he was convicted was infamous within the meaning of that term as used in the constitution as well as the statute. While there has been much debate as to what constitutes an infamous crime, we think, by the great consensus of authority upon the subject, it is now deemed to mean as here used—a crime punishable by imprisonment in the state prison. 12 Cyc. 135; Words & Phrases, 3573 *et seq.* While the pro-

vision already referred to gave rise to a vacancy in the office of county judge of *Green County* upon the conviction of plaintiff, no provision is made for restoration to office, or payment of the salary thereof, in case of a reversal of the judgment of conviction. For the accomplishment of that purpose plaintiff relies upon the provisions of sec. 4935 of the Statutes of 1917, which are as follows:

"Whenever any convict sentenced by any court of this state or of the United States to be punished by imprisonment in the state prison shall, at the time of conviction and sentence, hold any office under the constitution and laws of this state such office shall be deemed vacated from the time of his commitment to said prison; but if the judgment against said convict shall be reversed on a writ of error he shall be restored to office, with all its rights and emoluments; but if pardoned he shall not by reason thereof be restored to office."

In passing, it may be remarked that this statutory provision was enacted as a part of ch. 477 of the Laws of 1852, entitled "An act providing more fully for the organization of the state prison," and that its place in the statutes from that time to this has been in the chapter relating to the management of the state prison. Much thought and reflection has not enabled us to divine the reason which prompted the legislature to provide that an office shall be deemed vacated from the time of the incumbent's commitment to prison when it was already provided not only in the constitution but in the enactments of the legislature that such vacancy should occur upon conviction, and we feel that further speculation will be neither profitable nor satisfying. We have to determine whether this statute entitles plaintiff to his salary for the unexpired portion of his term of office from which he was excluded by reason of his conviction.

It is plain that if the judgment against a convict in the state prison shall be reversed on writ of error "he shall be restored to office, with all its rights and emoluments." Does this statute apply to plaintiff's situation? He was never committed to the state prison. This section never

operated to oust him from office. He was not within the class of persons therein dealt with. Note that the section contains two features: the first works a forfeiture of office; the second, a restoration. This section did not work a forfeiture of plaintiff's office. Can it be said to work a restoration? It seems plain that the class affected by the restorative provision is identical with the class affected by the forfeiture provision, and that no one who does not fall within the condemnation of the statute is entitled to its privileges. We come quite clearly to the conclusion, therefore, that the plaintiff did not fall within the class dealt with in this statutory provision, and that his right to recover his salary finds no justification therein.

This conclusion renders it unnecessary for us to discuss a further vexing question that would be presented if this provision were held to apply to plaintiff, and that is whether it entitled him to the salary of the office during the time when he did not perform the duties thereof. That such was the legislative intent is far from being clear.

There now remains to be considered another legislative act upon which plaintiff relies for a right of recovery. Ch. 362 of the Laws of 1919, according to its title, was "An act to renumber and revise the sections of chapter 17 of the statutes, relating to resignations, vacancies and removals from office; to assemble therein pertinent local provisions scattered throughout the statutes; to remove inconsistencies and conflicts in and to harmonize sections and provisions of the statutes; to renumber sections and subsections and to amend other sections and subsections therein named from which pertinent local provisions have been removed for consolidation into chapter 17; and generally to consolidate, revise and provide uniform provisions relating to resignations and removals from and vacancies in offices of the state, counties, towns, and of cities, villages and school districts." By that act sec. 17.02, above referred to, was renumbered and made sec. 17.03, and sec. 14 of the act provided:

"Subsection (5) of new section 17.03 and sections 4507

and 4935 of the statutes are consolidated as subsection (5) of said new section 17.03 and are revised to read: (17.03) (5) His conviction by a state or United States court of and sentence for treason, felony or other crime of whatsoever nature punishable by imprisonment in any jail or prison for one year or more, or his conviction by any such court of and sentence for any offense involving a violation of his official oath, in either case whether or not sentenced to imprisonment. A vacancy so created shall in no case be affected by a stay of execution of judgment. Reversal of the judgment against such officer shall forthwith restore him to office, if the term for which he was elected or appointed has not expired, but, in any event, shall entitle him to the emoluments of the office for all the time he would have served therein had he not been so convicted and sentenced; but pardon shall not restore him to office or entitle him to any of the emoluments thereof."

It will be seen that the provisions we have had under consideration were therein brought together, consolidated, and made a part of the chapter relating to resignations, vacancies, and removals from office. If that statute had existed at the time of plaintiff's conviction it would undoubtedly have entitled him to the salary which he now claims.

Upon the argument the writer queried whether this enactment might not be construed as a legislative interpretation of the then existing law, but a consideration of the act seems to negative such a purpose. In the first place, it says that three separate sections of the statutes are consolidated and revised to read. A revision of the statutes is something more than a restatement of the substance thereof in different language.

"Revision of statutes implies a re-examination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement mav be with or without material change. A revision is intended to take the place of the law as previously formulated By adopting it the legislature say the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute. It displaces and repeals the former law as it stood relating to the subjects

within its purview. . . . The purport of the numerous cases cited . . . is that where a statute is revised, or a series of acts on the same subject are revised and consolidated into one, all parts and provisions of the former act or acts that are omitted from the revised act are repealed." 1 Sutherland, Stat. Constr. (Lewis' ed.) §§ 269, 270; *Pratt Institute v. New York,* 183 N. Y. 151, 75 N. E. 1119.

Furthermore, that a change in the existing law was intended is manifest from the very first sentence of the section. Original section 17.03 declared a vacancy in the office when the incumbent should be convicted of an infamous crime. As re-enacted it provides for a vacancy in the office if he shall be convicted of any crime punishable by imprisonment in any jail for one year or more. A crime so punishable is not an infamous crime as that term is used in the constitutional provision or in the original sec. 17.03. Even if it should be held that within the contemplation of the constitutional, or former statutory, provision under consideration the sale of watered milk, for which the statute denounces a penalty of imprisonment in the county jail not more than thirty days, should be regarded as an infamous crime, as was held in *Geary v. Bennett,* 53 Wis. 444, 10 N. W. 602 (a slander case), still the re-enactment of sub. (5) indicates a clear change in the law upon this subject, because it does not provide for forfeiture of office unless the penalty provided is imprisonment in jail for at least a year. So that sec. 14, ch. 362, of the Laws of 1919 must be construed as a re-enactment, and not a mere continuance, of existing law.

We now come to the question of whether this law, which became operative June 20, 1920, before the reversal of the judgment of conviction and after the expiration of plaintiff's term of office, operated to vest in him a right to the salary which he claims. At the time of plaintiff's conviction he was vested with no right of restoration or recovery of salary in the event of the reversal of the judgment of conviction

upon appeal. No existing law provided therefor. The wrong which plaintiff sustained was inflicted at the time of his conviction. Statutes creating new rights are not construed as applying to past wrongs unless plainly so intended. *Keeley v. G. N. R. Co.* 139 Wis. 448, 121 N. W. 167; *Quinn v. C., M. & St. P. R. Co.* 141 Wis. 497, 124 N. W. 653. In case of doubt or ambiguity they are construed as prospective only. *Ibid.* The revision we are considering is plainly prospective in its terms. It must be construed as applying only to public officers convicted of one of the offenses enumerated therein after its enactment. Furthermore, it was not within the power of the legislature to make the restorative features of the law applicable to plaintiff. It must be borne in mind that he was effectually divested of any right or title to the office. His status with reference to the office was fixed at the time of his conviction. Thenceforth he was a stranger thereto, as much as any other elector of *Green County.* A successor was lawfully in possession of the office. The legislature could no more restore the plaintiff to the office than it could induct therein one who had never held the same. Such offices must be filled either by election or appointment. They cannot be filled by legislative action. The impotency of the legislature to restore plaintiff to his office is an additional reason for not construing the law so as to vest in him the right to recover the unpaid salary.

We are not insensible to the justice of the law as it now exists. This law, with sec. 3203*a*, Stats., indicates a purpose of society, speaking through its legislature, to assume responsibility for its wrongs inflicted upon the individual members thereof somewhat commensurate to the liability imposed upon individuals responsible for wrongs inflicted upon others. It is to be regretted that the legislature did not act in time to make the law available to plaintiff, although the recognition by society of its duties and respon-

sibilities, as indicated by the act in question, is encouraging and commendable.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). The somewhat anomalous position and provisions of sec. 4935, Stats., as it stood prior to 1919 is commented upon in the majority opinion.

I agree with the view that that section as it stood at the time of plaintiff's conviction did not of itself work a forfeiture of office, that being effected by then sec. 17.02, Stats. Therefore said sec. 4935, Stats., as it stood all those years must have been intended to refer to persons whose right to office was forfeited under sec. 3, art. XIII, Const., and under sec. 17.02, or else to none at all. To give the reasonable construction to it and to which such beneficial statute is entitled, it would have to be held that it was intended to benefit those who so forfeited office by conviction rather than by a subsequent commitment; the statute therefore could not, in this essential, be literally followed.

Furthermore, its evident purpose was the giving to such particular class of unfortunate victims of a miscarriage of justice who had been unlawfully deprived, through the mistaken act of the sovereign, of the right to continue to hold and enjoy an office given under the laws of the sovereign, compensation or damages for such deprivation and measuring the amount thereof by the rate of the salary fixed for such office.

That the salary was considered as something over and above, or separate and apart from, the office itself is quite manifest, because otherwise the following quoted words from sec. 4935, Stats., where, after providing for restoration to office, it also says, "with all its rights and emoluments," were rank surplusage, for plainly restoration to office would of itself and without further proviso carry with it, as a matter of right and law, the prescribed compensation so long as the office be further occupied and services ren-

dered therein. Such proviso, therefore, must be given weight and meaning in the construction of the entire statute. Such conclusion is further strengthened by consideration of ch. 362, Laws 1919. That, it is conceded, was a bill proposed by the revisor of statutes and must be considered in the light of the presumption that arises from the plainly prescribed statutory duties of such revisor, sec. 43:08, Stats., which defines his duties as being "to formulate and prepare a definite plan for the order, classification, arrangement, printing and binding of the statutes and session laws," and also, after preparation during the intervals of the legislature, "to present to the judiciary committee of the senate . . . such consolidation, revision and other matters relating to the statutes." His bills as presented, therefore, should be looked at in view of the statutory purpose so declared, that is, of simplifying and clearing up the existing law, rather than as proposals to make any material changes in the law. The very heading of this chapter indicates compliance with that duty of effecting the revision and consolidation rather than of making any substantial amendments, changes, or creating new rights. Some of its many provisions, it is true, expressly provide for minor amendments, but by sec. 14 of that chapter, and which is the one material here, the declared subject matter thereof is consolidation and revision, and the word *amend* is conspicuously absent. It provides for consolidation of sub. (5) of the newly thereby created sec. 17.03 with sec. 4935, the one here being considered, and also sec. 4507, which read:

"Any justice of the peace who shall be convicted of bribery or perjury or any other infamous crime, shall in the same sentence be expelled and removed from such office."

This latter provision, in substance, has stood in the statutes as long if not longer than the other provisions so consolidated. It was originally § 7, art. I, "An act concerning justices of the peace," on p. 321 of the Territorial Statutes of 1839, then sec. 264 of ch. 88, "Justices' courts," in the

Revised Statutes of 1849 (apparently wrongly quoted in some of the revisions), then again as sec. 234 of ch. 120 of the revision of 1858, and after subsequent minor changes in language it subsequently appeared as sec. 4507. Through all of its changes, however, it was in accord with the general law covering removals from office, in that it was the conviction and not a commitment that worked a forfeiture. By its consolidation with the other provisions under said ch. 362, Laws 1919, the language of this section disappears altogether, and a justice of the peace is now evidently placed in the same general category with all other officeholders of the state. It could hardly be urged that the provisions of this revised chapter either amended or repealed the old sec. 4507. It was simply carried on and merged into sub. (5), sec. 17.03, and I think the same view should be adopted and conclusion arrived at as to what was intended to be done by the consolidation of said sec. 4935. It was condensation and clarification rather than amendment.

For the foregoing reasons I think the plaintiff came within the reasonable terms of the statute as it stood at the time of his conviction so as to have been entitled to his present claim for compensation upon the reversal of the judgment of conviction though there had been no change in the statute.

I am also convinced that plaintiff was within the terms of sec. 17.03, Stats., as it stood after the revision of 1919 and as it was in force at the time of the reversal. It is a highly remedial statute and should receive no harsh or strained construction. It is aimed to make a slight recompense to one who has suffered a grievous wrong done through the instrumentalities of the sovereign, either state or national, by that which is subsequently found to have been a mistake or miscarriage of justice. That the required financial compensation is to be borne by a particular community rather than by the state at large ought not to militate against its application.

That the salary is to be considered as merely the meas-

ure of compensation is much strengthened from the fact that since 1913, when ch. 189 of the laws of that year created sec. 3203*a*, it has been provided that compensation, which under this law is a pure gratuity, should be given by the state to innocent persons who had nevertheless served terms of imprisonment upon conviction of a criminal charge.

Doubtless one who would come within the literal meaning of sec. 3203*a* and who happened to be an officeholder at the time of his conviction and thereby forfeited his office would not be entitled to compensation under the general terms of sec. 3203*a* and also under sub. (5), sec. 17.03, and would be confined, either by option or construction of law, to not more than one such method of relief; but nevertheless the idea of compensation is the basis of the one as much as of the other. It is a gratuitous compensation to be borne by the taxpayers, and whether of the commonwealth at large or of some particular community does not essentially alter the spirit and purpose of the laws.

Such features make a substantial distinction between such a case as the one here, or one coming under sec. 3203*a*, and the situation where, under the doctrine of public policy as adopted by this court, after a choice from conflicting decisions elsewhere, and as pronounced in *Clausen v. Fond du Lac Co.* 168 Wis. 432, 170 N. W. 287, it is held that municipalities, in the absence of specific statute, should not be required to pay the salary of an ousted *de jure* officer for a period for which it was paying for and receiving the services of a *de facto* officer.

It is held by the majority opinion that to allow the plaintiff to recover under the statute as it stood after the revision of 1919 and at the time of the reversal of the judgment when the term of his office had expired would be to give it a retroactive effect, citing as a basis for such ruling *Keeley v. G. N. R. Co.* 139 Wis. 448, 454, 121 N. W. 167, and *Quinn v. C., M. & St. P. R. Co.* 141 Wis. 497, 124 N. W. 653, both of which involved changes in the death-recovery

statute made after the death for which compensation was sought in the several actions. But, as it was pointed out in the *Quinn Case,* the right to relief under that statute becomes an inchoate one upon the happening of an injury and ripens into a cause of action immediately upon the death, and the rights then so fixed at such respective periods cannot be added to or lessened by legislation (*White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 151, 133 N. W. 148); but to my mind the substantial and important distinction between the two cases is this: There is no right, inchoate or complete, to any subsequent salary as compensation arising upon the conviction. That works, by the constitution and the statute, an absolute forfeiture of office and thereby of salary. The right to the salary as a measure of compensation arises out of the reversal and not from the conviction. The two are separate, distinct, and independent transactions. Plaintiff can base no right upon his conviction, which is, until reversed, absolutely disqualifying, binding, and controlling. When by subsequent proceedings a new result is arrived at, namely, a reversal, then by and through such new proceedings and new conclusion—then and not until, then—do his rights under the statute arise and become fixed. The time of his conviction would therefore be entirely immaterial.

So far as the plaintiff here is concerned, the benefits under sub. (5), sec. 17.03, Stats., first became applicable to him when the reversal of conviction occurred, for until then he had no shadow or semblance of claim to them, and when that time came he was within all the conditions of the statute entitling him to such relief. Being in the nature of a gratuity, so far at least as compensation is made for the time for which he could render no services during the period of conviction, there is no question arising as to whether the statute so giving such gratuity is retroactive or not. There is no more need of considering the question whether there is an express or implied intention to have a retroactive effect,

for such intention may be by implication as well as by express language (*Read v. Madison,* 162 Wis. 94, 100, 155 N. W. 954), as to this statute, than in the case of granting relief to persons who had previously suffered personal injury in connection with some state activity, of which the laws of each session of the legislature afford numerous instances. For example, in the session of 1919 there were allowances of $3,000 and $2,000, respectively, to persons injured by an aeroplane accident at the state fair in 1910, and another substantial allowance for injuries at the same place in 1917, and another to one whose husband had been killed at one of the state institutions.

The judgment of the lower court, to my mind, should have been reversed.

DOERFLER, J. I concur in the above dissent.

The appellant moved for a rehearing.

In support of the motion there was a brief by *J. M. Becker in pro. per.*, and in opposition thereto a brief signed by *H. N. B. Caradine* and *Olin, Butler, Thomas, Stebbins & Stroud.*

The following opinion was filed February 7, 1922:

PER CURIAM. Upon a motion for a rehearing the appellant calls attention to the fact that although he was convicted on August 6th and sentenced on August 18th, nevertheless he continued to act as county judge until the 20th day of September, at which time his successor qualified and assumed the office; that he was paid the salary of the office up to and including August 31st; that he is at least entitled to the salary for the period between August 31st and September 20th, during which time he actually occupied the office. This contention is made for the first time upon the motion for a rehearing. Whether appellant is entitled to the salary of the office during such twenty-day period de-

pends upon special considerations not raised or involved in the theory upon which the case has been prosecuted. The cause of action set out in the complaint is for the salary of the office during the entire period for which it was withheld from appellant. The theory upon which he claimed to have been entitled thereto is fully reviewed in the opinion. His right to the salary during the twenty-day period involves considerations distinct from those heretofore urged upon the county board, the circuit court, or this court, and a claim which was not presented to the county board.

The cause of action set out in the plaintiff's complaint is probably sufficient as a matter of pleading to enable him to recover his salary for any part of the period covered thereby to which he may lawfully be entitled. He should, however, have called to the attention of the trial court as well as the county board the distinct nature of his claim for salary for the twenty-day period. As the claim was presented to the county board and as the case was prosecuted, neither the trial court nor the county board had an opportunity to pass upon the question now raised. It is well established that matters not called to the attention of the court and opposing parties during the trial, so that in the determination of the issues they may be given due consideration, are effectually waived and cannot thereafter be urged as grounds for a new trial or for a reversal of the judgment on appeal. *Congar v. Chamberlain,* 14 Wis. 258; *Harrington v. Downing,* 166 Wis. 582, 166 N. W. 318. An application of this rule in its full vigor would require a holding that plaintiff has waived his right to the salary of the office during the twenty-day period. While we should not entertain the question thus presented for the first time upon a motion for a rehearing, we are not disposed to absolutely foreclose the plaintiff from recovering the salary for the twenty-day period if he be entitled thereto—a question upon which it must be understood we express no opinion.

We feel that the plaintiff should have the opportunity, if he so desires, of presenting his claim for the salary during

the twenty-day period to the county board and to pursue the usual remedies for its recovery. The judgment in this case, therefore, will be without prejudice to the rights of the plaintiff in such respect. The cause of action involved herein will not be considered as including the cause of action for the salary for the twenty-day period, and the judgment herein will not be *res adjudicata* in any proceedings instituted for a recovery of such salary. Otherwise the motion for rehearing will be denied.

So ordered.

HEAL, Respondent, vs. STOLL and another, Appellants.

October 19, 1921—February 7, 1922.

Fraud: Misrepresentations as to value of second mortgage: Complaint: Statement of fact or opinion: Sufficiency of evidence: Belief of purchaser that he is dealing with principal: Liability of principal for fraud of agent: Damages: Value of lands: Evidence.

1. In an action for deceit in which the damage was a failure of the maker to pay a note secured by a second mortgage sold by defendant to plaintiff, allegations in the complaint of the foreclosure of the first mortgage and the sale of the mortgaged property for an amount sufficient only to meet such mortgage, interest, and costs, with other allegations that the mortgagor was not solvent at the time of the foreclosure and has never since been solvent, were sufficient to show damage to plaintiff without showing that he had taken steps to collect the note.
2. Where the evidence was conflicting as to representations made by defendants' agent, the findings of the jury are binding on this court.
3. Whenever there is any doubt as to whether a statement by a vendor as to value is made as an expression of opinion or as a statement of fact, the question must be determined by the jury or the court.
4. The evidence in this case is *held* sufficient to support findings of the jury that defendants' agent had represented a note as good for its face value and had misrepresented the value of the land securing the note, and that plaintiff had relied on these statements.
5. The belief of plaintiff that he was dealing with the principal instead of the agent up to the time of the assignment of the

note and the mortgage does not change the relation of principal and agent so as to relieve the principal from liability for misrepresentations of the agent.

6. Where one of two innocent persons must suffer from the fraud of another, the one who furnished the means to commit or whose negligence caused the wrong to be committed must bear the loss; and a principal is liable for false representations of his agent causing damage to a party with whom the agent deals in the course of business authorized to be carried on by him, regardless of whether the principal knew of the false representations or intended them to be made.

7. While plaintiff must exercise reasonable care and diligence to avoid loss and minimize damage, it is held that this court cannot set aside an answer of the jury to the effect that the plaintiff did not fail to exercise ordinary care in taking such steps as an ordinarily prudent man would have taken in protecting and securing his second mortgage, as all the circumstances in that regard were doubtless considered by the jury.

8. In fixing the value of lands the jury is not bound to take the average of estimates of witnesses, but should weigh the opinions of all the witnesses, and in making their determination they were not bound to ignore entirely their own knowledge with respect to the elements which combine to constitute value.

ESCHWEILER and ROSENBERRY, JJ., dissent.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This is an action for deceit on the alleged false representations of the defendants concerning the value of a note secured by a second mortgage.

The complaint alleged that the defendant *Stoll* was the agent of the defendant *Schroeder* and was duly authorized to act on behalf of *Schroeder* in the transaction complained of; that the defendant *Stoll* had a financial interest in the transaction; that on or about March 31, 1913, *Stoll* induced the plaintiff to sell his land in Vernon county, Wisconsin, to *Schroeder* for the sum of $15,400, and to take as part payment a note executed by one Turner, payable to *Schroeder,* in the amount of $7,534, which note was se-

cured by a mortgage on a 1920-acre ranch in Emmons county, North Dakota, and was subsequent to a mortgage of $16,500 on the same property.

The complaint further alleged that *Stoll,* in order to induce plaintiff to make the trade and to accept the note, wilfully, fraudulently, and falsely represented to plaintiff that said note and mortgage were as good as gold; that the Dakota land was worth $20 per acre; that Turner was a thrifty man, solvent, and the owner of a large amount of suitable farming equipment unincumbered by mortgage; that acceptance of said note would be a good deal for plaintiff; and that said lands were a fine ranch and good rich soil; whereas in fact the note and mortgage neither then nor ever has been of any value whatever; the land did not then nor at any time thereafter exceed in value $12 per acre; the mortgagor, Turner, was neither then nor thereafter thrifty, solvent, nor the owner of any considerable amount of unincumbered personal property; and the ranch was of poor soil and not suitable for cultivation to any appreciable extent.

Plaintiff further alleged that he knew nothing of the nature or value of the ranch; that he relied solely on the representations; that *Stoll* knew all of the facts, and that he knew plaintiff was being deceived and defrauded, and that he intended that plaintiff should be so deceived and defrauded. He also alleged that defendant *Schroeder* knew the falsity of the statements and that the plaintiff was being defrauded.

The complaint then set out that on July 10, 1915, the ranch was sold under foreclosure for $19,800, the amount of the first mortgage and interest, which sum plaintiff alleged to have been the full value of the land; that he had often tried but had never been able to sell the note and mortgage; and that plaintiff had suffered damage to the amount of $7,534, with interest at six per cent. from April 18, 1913.

The defendants each filed a separate answer and in addition to these a joint answer in the nature of an equitable counterclaim.

The defendant *Stoll* admitted his agency but denied that he had any further financial interest, and denied the allegations of fraud. He alleged that the land was adequate security for both mortgages and that any loss suffered by the plaintiff was due to his own failure to use ordinary care in protecting his interest. He alleged further that the plaintiff did not rely on his representations, but, on the contrary, sought information elsewhere as to all the material facts set out in the complaint.

The defendant *Schroeder* denied all personal knowledge of the negotiations preliminary to the sale; and denied that he made or knew of any false representations being made during the transaction. He alleged that any loss suffered by the plaintiff was due to his own lack of diligence. The joint answer repeated for the most part the allegations of the other answers.

The evidence showed that the plaintiff, a farmer living near Viroqua, approached the defendant *Stoll*, a storekeeper of the same town, with a view to disposing of his property. *Stoll* offered to buy his land for $15,400 and give in payment cash and the note in question. *Stoll* acted as the agent of *Schroeder* and received a commission of three per cent. Plaintiff, however, thought *Stoll* was the principal until the conclusion of the transaction when *Schroeder* assigned the note and mortgage. The note was indorsed without recourse.

It is not disputed that plaintiff knew of the first mortgage. During the course of the negotiations he went to Mr. Procter of Viroqua, who was president of the bank which held the first mortgage. From the testimony of these two it appears that Procter told him that he did not know the value of the ranch, but that it was at least sufficient to cover the first mortgage.

After the contract was entered into, but before the assignment or deed was made, the plaintiff talked with C. E. Green, a former owner of the ranch, who happened to be in Viroqua at that time. Green testified that he truthfully answered all the questions of the plaintiff. Plaintiff asked only a few questions in this interview, as to the character of the ranch, the amount of stock, and the cultivated area. He gave as his reason for not making a full inquiry:

"I didn't inquire about any of these things because I was relying on *John* [*Stoll*]. I didn't know Mr. Green. That is the only explanation I have to offer."

Concerning the alleged false representations the plaintiff testified that *Stoll* said the note was as good as gold; that Turner, the owner, was well equipped with machinery and stock and had $40,000 invested and would not let the land go for the indebtedness; that he had eighty head of cattle; and that the land was worth $20 per acre. He stated that he had known *Stoll* for about twenty-five years and that he relied entirely on his statements, and that *Stoll* did not tell him to visit the ranch.

As to the note, he testified that he tried to sell it to the First National Bank of Viroqua, to the Vernon County Bank, to Mr. Bennett of Viroqua, and also that he had tried to use it as collateral several times and had been unable to do so, with the exception of once when for a time it was accepted as security for a loan. He further testified that Procter offered to renew the first mortgage and carry it along with the second if the plaintiff would agree to assume the whole debt, no additional security being required. He testified that he was unable to do this and that the first mortgage was foreclosed, the sale bringing only the amount of the first mortgage with accrued interest.

The defendant *Stoll* testified that he had visited the ranch twice; that he had told plaintiff that the land had been twice turned in trade for $20 per acre. As to the alleged statements regarding the condition of Turner, he testified that

he had only said that Turner was equipped to operate the ranch in the manner his contract called for; and that statements of Turner's financial condition related to a time before the deal. He testified that he made no representations concerning the value of the note, the quality of the soil, or the merits of the deal. He said further that he had directed the plaintiff to visit Procter and to go inspect the land; and that he had introduced him to Green, a former owner.

Plaintiff never made any complaint to defendants about the misrepresentations except by the service of the complaint.

Turner testified that he bought the ranch in 1913, paid $42,000 for it, and gave the note in question to *Schroeder*. He testified that in March, 1913, he was unable to pay the note. There was other evidence tending to show his insolvency.

It is undisputed that in the summer of 1915 the land was sold under foreclosure for $19,800 and that in November of the same year the purchaser at the sheriff's sale sold it for $24,000. The note is in the hands of the plaintiff, is not outlawed, and has never been reduced to judgment.

In a special verdict the jury found that *Stoll* had represented the note to be good as gold, meaning thereby good for its face value, and that the land was worth $20 per acre; that plaintiff had relied on these statements; that the land was actually worth $10 per acre; that the note was worth nothing in 1913; that the plaintiff was not lacking in care to rely on the representations of *Stoll;* and that he had not been guilty of laches in protecting his mortgage.

Judgment was entered for the plaintiff in the sum of $11,165.25.

For the appellants there was a brief by *Smith & Moen* and *J. Henry Bennett,* all of Viroqua, and oral argument by *Mr. Bennett* and *Mr. C. J. Smith.*

For the respondent there was a brief by *P. A. & R. R.*

Williams of Marshfield, and oral argument by *R. R. Williams.*

The following opinion was filed November 15, 1921:

JONES, J. Defendants' counsel at the trial demurred to the complaint *ore tenus* on the ground that it did not state facts sufficient to constitute a cause of action.

It is argued that it did not appear that any steps had been taken to collect the note and second mortgage and hence it did not appear that they might not have been collected in full. For this proposition *Foster v. Taggart,* 54 Wis. 391, 11 N. W. 793, is relied on, and it is urged that fraud without damage or damage without fraud does not constitute a cause of action.

In that case the fraud was predicated on the representations as to the value of a note and first mortgage on which there had been no foreclosure, and it was held that the complaint was bad because it failed to show that the securities were insufficient and what would be the probable deficiency upon a sale on foreclosure. In the present case the complaint alleges the foreclosure of the first mortgage and the sale for an amount only sufficient to meet the mortgage, interest, and costs, thus wiping out plaintiff's mortgage lien. These allegations and others that the mortgagor was not solvent at the time of the foreclosure of the mortgage, and has never since been solvent, seem to show beyond question loss or damage to the plaintiff.

In discussing the rule of damages for misrepresentation on the sale of a first mortgage, Mr. Justice NEWMAN said:

"If the securities had already been foreclosed and applied, evidence of that fact would be pertinent and cogent to establish the actual amount of damage." *Beetle v. Anderson,* 98 Wis. 5, 10, 73 N. W. 560.

There was conflict in the testimony as to the representations made by the agent, *Stoll.* On this subject we have

plaintiff's emphatic statements and *Stoll's* emphatic denial. The jury found that *Stoll* represented that the note and mortgage were as good as gold, and in a separate answer that it was understood by the plaintiff and *Stoll* that this statement meant that the note and mortgage were worth their face value. They also found that this statement was made to induce the purchase. The jury further found that, to induce plaintiff to accept the note and mortgage, *Stoll* represented that the Dakota land covered by the mortgage was worth $20 per acre and that plaintiff relied on this representation and the other as to the value of these securities. On this record we are bound to accept the answers that *Stoll* made the representations as alleged.

Whether plaintiff had the right to rely on these representations is perhaps a more serious question.

It has often been declared that mere statements by the seller as to the value of property are to be treated as expressions of opinion and not as representations of value. But there is no such unbending rule. The fiduciary or nonfiduciary relation between the parties, the experience, or want of it, of the buyer, the nearness or remoteness of the subject of sale, the ease or difficulty of its inspection, all are subjects which may properly be considered in this connection; and the decisions of this court hold that the mere fact that the statement takes the form of an expression of opinion is not always conclusive. Whenever there is any doubt as to whether it is made as a mere expression of opinion or as a statement of fact, the question must be determined by the jury or court.

In an opinion by Mr. Justice ROSENBERRY it was said:

"A study of the cases suggests the thought that, in the absence of an express intent to defraud, the determination of whether or not certain representations are statements of fact or of opinion depends upon whether or not the person to whom the representations are made may, under all the facts and circumstances of the case, including such person's capacity or want of capacity, rely upon them. Where the person to whom they are made may rely upon them they are held to

be statements of fact; where the person to whom they are made may not rely upon them, without being guilty of a want of ordinary care and prudence, they are denominated opinions." *Miranovitz v. Gee,* 163 Wis. 246, at p. 255 (157 N. W. 790).

See, also, *Karls v. Drake,* 168 Wis. 372, 170 N. W. 248; *Svoboda v. Rubin,* 169 Wis. 162, 170 N. W. 955; *Becker v. Spalinger,* 174 Wis. 443, 183 N. W. 173.

There are many authorities holding that false statements of the value of land far distant may be relied on by the buyer as matters of fact and not mere expressions of opinion. See cases cited in 35 L. R. A. 430 and 37 L. R. A. 610.

It is earnestly argued by defendants' counsel that plaintiff had before bought and traded several farms; that he was advised by the defendants to go and see the Dakota land before the deal was closed (this, however, was denied by plaintiff); that he had full opportunity to make further inquiries about the value of the ranch; and that the finding of the jury that he had used ordinary care in relying upon the statements and representations should be set aside. All these subjects were proper for the consideration of the jury and were no doubt ably presented by appellants' counsel, and we cannot say as a matter of law that the answer of the jury was without credible evidence to support it.

It is also argued that there is no proof of misrepresentations by the defendant *Schroeder;* that *Stoll* was a mere middleman for whose misstatements, if any were made, *Schroeder* was not responsible. The testimony shows beyond any reasonable doubt that *Stoll* acted as the agent of *Schroeder* during the whole transaction and received three per cent. commission. Plaintiff's testimony is that he supposed *Stoll* to be the principal until the time came for the assignment of the note and mortgage. But this fact in no way changes the real relation of the parties.

It is argued that *Schroeder* personally made no false representations and therefore cannot be held liable. By mak-

ing *Stoll* his agent for the sale of the securities *Schroeder* made it possible for a fraud to be committed, and where one of two innocent persons must suffer from the fraud of another the one who furnishes the means to commit or whose negligence caused the wrong to be committed must bear the loss. *Seidl v. Paulu,* 174 Wis. 403, 183 N. W. 246; *Wittenbrock v. Parker,* 102 Cal. 93, 36 Pac. 374, 24 L. R. A. 197; *Robbins v. Todman,* 28 Kan. 491; *Heyder v. Excelsior B. L. Asso.* 42 N. J. Eq. 403, 59 Am. Rep. 49; *McConnell v. American Nat. Bank,* 59 Ind. App. 319, 103 N. E. 809; 12 Ruling Case Law, "Fraud and Deceit," p. 401, § 149. It is important in this connection that *Schroeder* received the full benefit of the transaction.

It is also argued by defendants' counsel that *Schroeder* had no knowledge that the representations had been made and therefore is not liable.

But in such cases the scienter or wrongful intent is not indispensable. If it were the rule that a principal is immune from loss when his duly authorized agent makes false representations inducing a bargain, there would be little safety in a large proportion of the business transactions of daily life. The seller is bound to know that the representations made by himself or his authorized agent to induce a sale are true. *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790; *Law v. Grant,* 37 Wis. 548; *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923. See many cases cited in 12 Ruling Case Law, "Fraud and Deceit," p. 337, § 94.

Appellants' counsel argue that the plaintiff failed to use proper effort to protect himself from loss. It is true that plaintiff was bound to exercise reasonable care and diligence to avoid loss and to minimize the damage; and that to the extent that his damages were the result of his failure to exercise such care and diligence he cannot recover.

It is claimed that it was his duty to accept the offer of Procter to extend the time of payment of both mortgages

provided plaintiff would assume liability for their payment. To this argument plaintiff's counsel reply that his properties were nearly or quite incumbered for their full value, and, that ordinary diligence did not require him to assume a load of debts which he could never hope to pay. To the claim that plaintiff did not use due diligence in trying to sell the security it is replied that for several years he was making efforts to realize something from them but was unable to find a buyer and that the note and mortgage had no market value.

It is argued by defendants' counsel that plaintiff should have brought suit upon his note and thus made the attempt to collect of Turner. But the clear weight of testimony was to the effect that Turner was insolvent.

These were all subjects which were doubtless considered by the jury, and in their special verdict they found that the plaintiff did not fail to exercise ordinary care in taking such steps as an ordinarily careful and prudent man would have taken in protecting and securing the Turner mortgage. We cannot properly say as a matter of law that this answer should be set aside.

The jury found in their special verdict that the land included in the ranch when the trade was made was worth $10 per acre, and that the value of the Turner note at that time was nothing. Counsel for the defendants earnestly attack these findings, claiming that there was no credible evidence to support them and that the verdict was perverse. It is undoubtedly true that the preponderance of the opinion evidence indicated a greater value of the land than that found by the jury. Only one witness, Turner, estimated the land at $10 per acre. The average amount of all the values fixed by plaintiff's and defendants' witnesses was about $17. Green and defendant *Schroeder* valued the land at $20 per acre. Some estimated it at $12 and others at from $15 to $18. There could hardly be a better illustration of the fallibility of human testimony when it is sought to

determine values by opinion evidence. Defendants' counsel rely to some extent on the fact that Turner had agreed to pay in trade $42,000 for the ranch, including personal property, a few months before the representations were made, and that in November, 1915, the ranch was sold for $24,000, there being a commission of $2,500. On the other hand, it is argued by plaintiff's counsel that the ranch was unproductive, that only a small part of it was improved, that the climatic conditions were bad; and that on a public sale it only brought the amount of the first mortgage, interest, and costs.

It is argued by plaintiff's counsel that the same considerations apply to the findings of the jury as to the value of the note and mortgage, and that by reason of these facts and the existence of the large prior incumbrance they had no market value.

It is clear that in fixing the value of the ranch the jury were not bound to take the average of the estimates of witnesses. *Churchill v. Price,* 44 Wis. 540.

Counsel for defendants criticise especially the testimony of Turner, urging that he was a willing witness who had come from North Dakota, and that he was strongly prejudiced and unworthy of credit. He had evidently not found the ranch a bed of roses. He may have believed that he had been victimized and may have been prejudiced. Nevertheless the jury may have believed that he had much better knowledge of the land and its value than any other witness. The jury were not bound to accept the opinions of a majority of the witnesses. There was much conflict in the evidence as to values and there were many physical conditions described to the jury. It was the duty of the jury to consider and weigh the opinions of all the witnesses as expressed in this testimony, and the ultimate weight of that testimony was a question to be determined by the jury. In making their determination they were not bound to ignore entirely their own knowledge and experience with respect

to the elements which combine to constitute the value of the land. *Head v. Hargrave,* 105 U. S. 45; *The Conqueror,* 166 U. S. 110, 17 Sup. Ct. 510; *Maas v. C. & N. W. R. Co.* 156 Wis. 44, 145 N. W. 176.

The trial court saw the witnesses, heard their testimony, and refused to set aside the verdict. We do not feel justified in holding that there was no credible evidence to support the verdict of the jury as to the value of the land and the securities, or as to the other questions submitted to them, and hence the determination of the trial court should not be disturbed.

Exceptions were also taken to the introduction of evidence and the giving and refusing instructions, and to the refusal to submit certain questions. We have carefully considered these exceptions and find no prejudicial error.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). I think the present judgment goes too far and beyond even the heretofore recognized wide field of relief in such class of cases.

Here a man of mature years; of former business experience; dealing at arm's length with others; no trust or confidential relationship existing; with the fullest opportunity to examine for himself; no fraud or artifice interposed in the slightest degree to prevent his learning the facts, purchases a second mortgage in alleged reliance upon a seller's statement that it is "as good as gold."

From its very nature a second mortgage, as a matter of common knowledge, is not, and cannot be, as "good as gold" so far as being considered an article of immediate and ready sale in the market. Its very nature implies the possibility of future need of the owner thereof being able to take some steps to protect it in case of any possible future default as to it or as to the large and known first mortgage. Such an instrument as purchased here carries on its face lengthy provisions for foreclosure proceedings in case of

possible future defaults, so that express warning as to such possibility stares him in the face when he buys.

It is evident that at the time of the purchase he did not rest as a matter of fact upon what, on the trial, he testifies was his blind confidence in the seller's expression as to value, because he then sought information from Mr. Procter, interested in the first mortgage, and Mr. Green, the former owner of the very real estate, and all of his questions to each of those persons were evidently fairly and honestly answered.

Any statement made to him as to the then owner of the property, Turner not thereafter defaulting, was of course a representation as to the future, into which the buyer can look just as well and as far as the seller.

Representations as to the then present value of this mortgage, in my judgment, were of no more material weight or basis for the recovery permitted herein than those held to be insufficient for such recovery in *Farmers' Co-op. Packing Co. v. Boyd,* 175 Wis. 544, 185 N. W. 234 Furthermore, the overwhelming weight of the testimony was to the effect that at the time of the purchase by him of this second mortgage there was then a present sufficient equity in the property which made the second mortgage good in the reasonable acceptation of such an expression.

I think also that his delay in making any claim or in bringing this action should have been held fatal laches on his part, and that the judgment should have been reversed.

I am authorized to state that Mr. Justice ROSENBERRY concurs in this dissent.

A motion for a rehearing was denied, with $25 costs, on February 7, 1922.

KRONER, Respondent, vs. ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, Appellant.

October 20, 1921—February 7, 1922.

Appeal and error: Affirmance by divided court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment appealed from will be affirmed.

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This action was brought to recover on an accident policy held by the deceased in the defendant order.

Plaintiff contended that her husband's death was caused by drowning; the defendant contended that his death was caused by disease. The answer further sets up forfeiture of plaintiff's rights by reason of the cremation of her husband's body without first giving notice to the defendant order of the intention to cremate.

The case was tried before the court and a jury. By a special verdict the jury found that the deceased received a bodily injury effected through external, violent, and accidental means; that his death was caused by his falling into a ditch and being drowned or suffocated in the mud and water; that his death was occasioned by such bodily injury alone and independent of all other causes.

Certain questions involving the interpretation of the contract were raised in the case. In regard to these questions the court found that the defendant issued the certificate of insurance and agreed to indemnify the beneficiary in case death resulted through external, violent, and accidental means, alone and independent of all other causes; that the contract provided for forfeiture in case of cremation without first giving seven days' notice; that Fred Kroner died June 1, 1918, and his body was cremated on June 3, 1918; that the cremation was at the expressed wish of the de-

ceased and was done in good faith and without fraud; that plaintiff had no knowledge of the existence of the certificate of insurance until after the cremation; that on the 4th, 13th, and 29th days of June, 1918, the plaintiff gave separate notices in writing of the death of deceased to the supreme secretary of the defendant, giving the name and address of deceased and stating the cause of death and full particulars of the accident; that the defendant failed, neglected, and refused to furnish blanks for proofs of death; that the defendant on July 2, 1918, in writing, notified *Louise Kroner* that it denied all liability to her as beneficiary under the certificate on the sole ground that the remains of Fred Kroner had been cremated without first giving notice thereof to the supreme secretary at least seven days in advance of the intended cremation.

As conclusions of law the court found that the defendant accepted the notices of death sent by *Louise Kroner* as sufficient notices under the contract, and waived all other notices and proofs of death and the time and manner in which such notices and proofs are to be given, required in the certificate and contract; that under the evidence and facts as found in this case it is unreasonable to declare and to enforce a forfeiture of the plaintiff's claims under the insurance certificate on the ground that the body was cremated without first giving notice; that the beneficiary was excused from giving such notice; and that as to the plaintiff, under the facts and circumstances shown in this case, the provision as to cremation in said certificate is inapplicable, null, and void.

Judgment was entered for the plaintiff in the sum of $7,409.81, from which judgment defendant appeals.

For the appellant there was a brief by *E. J. B. Schubring* of Madison, attorney, and *John A. Millener* of Columbus, Ohio, of counsel, and oral argument by *Mr. A. R. Peterson* of Madison and *Mr. Schubring.*

For the respondent there was a brief by *J. T. Dithmar* and *R. P. Clark,* both of Elroy, and oral argument by *Mr. Dithmar.*

The following opinion was filed November 15, 1921:

SIEBECKER, C. J. Mr. Justice JONES is disqualified from participation in the decision of this case in this court for the reason that before he became a Justice of this court he had acted as an attorney for the defendant in this litigation. The other six Justices of this court who participated in the decision on this appeal are equally divided in opinion as to the correctness of the judgment entered in the trial court and appealed from to this court. Three of such Justices are of the opinion that the judgment appealed from is correct and should be affirmed, and three of such Justices are of the opinion that such judgment should be reversed and that judgment should be awarded dismissing the complaint. This, under the rule, requires an affirmance of the judgment awarded by the trial court. *Hagenah v. Milwaukee E. R. & L. Co.* 136 Wis. 300, 116 N. W. 843, and cases there cited.

By the Court.—It is so ordered.

JONES, J., took no part.

A motion for a rehearing was denied, with $25 costs, on February 7, 1922.

DEKOWSKI, Respondent, vs. STACHURA and wife, Appellants.

November 16, 1921—February 7, 1922.

Specific performance: Liquidated damages: Contract to convey or pay damages: How enforced.

1. Where damages are stipulated by the parties, the sum named will be treated as liquidated damages unless the amount appears to be grossly in excess of actual damages or to have no relation thereto.
2. A contract for an exchange of lands which provided that in case either party should fail, refuse, or neglect to perform he should forfeit and pay to the other $500 as liquidated damages, is construed to mean that each party reserved the right to withdraw from the contract upon payment of such sum, and specific performance will not be decreed.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Specific performance. Plaintiff is a business woman, operating a hotel at Pulaski, Wisconsin, and engaged in buying and selling real estate. The defendants are Polish people, who are unable to write and speak the English language understandingly, and were the owners of a certain flat building in the city of Chicago worth $5,000 and incumbered for $2,300. The defendants were desirous of exchanging their Chicago property for a farm and solicited the aid of one Sebastian Passouicz, who was unable to respond to their call, and sent his wife. Thereafter Mrs. Passouicz met *Mrs. Dekowski* and learned that *Mrs. Dekowski* had a farm for sale, and it was arranged that the defendants should visit the farm, which they did. After some considerable negotiation it was agreed that the plaintiff and the defendants should exchange properties and that the defendants should pay to the plaintiff $500. The contract was made October 28, 1920. November 2d or 3d the defendants became suspicious, again inspected the plaintiff's farm, and concluded that the value of the farm had been

misrepresented to them, and on November 9th they went to the scrivener, one Glowinski, and demanded the return of their papers, which demand Glowinski refused. The plaintiff went to Chicago and looked over the flat building, but the record does not disclose at what time that was done, and on November 29th Glowinski, the scrivener, wrote a letter to the defendant *Jozef Stachura* stating that the plaintiff had left with him abstract, warranty deed, and insurance policies, and advising him to complete the trade promptly. This the defendants declined to do, and this action was begun by the plaintiff to enforce specific performance of the contract on the part of the defendants. From a judgment in favor of the plaintiff the defendants appeal.

Sol. P. Huntington of Green Bay, for the appellants.

For the respondent there was a brief by *Cady, Strehlow & Kaftan* of Green Bay, and oral argument by *Robert A. Kaftan.*

The following opinion was filed December 13, 1921:

ROSENBERRY, J. The defendants, upon the trial, relied upon fraud as a defense to the action, claiming that they were unskilled in business ways, particularly in the matter of contracts; that the amount of tillable land was misrepresented; that the plaintiff represented, contrary to the fact, that she had received a cash offer of $9,600 for the premises. The trial court said:

"The issues in the case utterly fail to show any fraud or advantage perpetrated on the part of the plaintiff in securing the contract whatever. The defendants are people of considerable experience in the purchase and sale of property and were familiar with the value of land in the vicinity where this land was situated, so on this branch of the case I think the defendants' claim entirely fails."

The trial court's findings upon this branch of the case cannot be disturbed.

Some contention was made here and in the court below

by the defendants to the effect that the plaintiff did not make a sufficient tender to entitle her to specific performance of the contract on behalf of the defendants. In the view which we take of the case it becomes unnecessary to determine these questions.

The contract was in the usual form of exchange contracts. The first paragraph described the parties, recited the consideration, and contained a covenant on the part of the plaintiff to convey to the second parties the farm in question upon the second parties assuming mortgages amounting to $7,500. The second paragraph contained a clause that the second parties would convey the Chicago flat, the first party to assume the $2,300 mortgage, and this provision:

"Further it is agreed by *Joseph Stachura* and his wife to pay in cash money to *Rose Dekowski* $500 exchange, and if first party finds conditions wrong this contract is void."

The third clause contained the covenants as to exchange of abstracts and papers and provided that mutual delivery should be made on or before the 28th day of November, 1920, in the office of F. J. Glowinski. The brokerage fees of Anna Passouicz were to be paid, $100 by the first party and $150 by the second parties, and this provision:

"It is further agreed that in case either party to this agreement shall fail, refuse, or neglect to perform his part of this agreement within the time mentioned, to wit, 29th of November, 1920, or to execute and deliver the deeds of conveyance by him to be executed and delivered, then and in such case the said party who is in default shall forfeit and pay to the other party the sum of five hundred and no-100 dollars as liquidated damages for such failure and breach of contract."

The question arises whether the sum of $500 named in this clause is a penalty or liquidated damages. It is the well established rule in this court that where damages are stipulated by the parties the sum named will be treated as liqui-

dated damages unless the amount appear to be grossly in excess of actual damages or have no relation thereto. *Sheffield-King M. Co. v. Jacobs,* 170 Wis. 389, 175 N. W. 796, and cases there cited. Within the rule the amount named in this case appears to bear a very close relation to the actual damages. While the equities of the parties were small, the values of the property were considerable. It required mutual inspection, and on the part of the plaintiff a trip to Chicago and many other elements of expense, so that the amount stipulated does not appear to be unreasonable.

Having by the terms of the contract stipulated the damages, in case of breach will a court of equity grant specific performance? This question does not seem to have arisen in this state. The rule is laid down in 1 Pomeroy's Equity Jurisprudence (4th ed.) § 447:

"Where, however, the parties to an agreement have added a provision for the payment, in case of a breach, of a certain sum which is truly liquidated damages, and not a penalty,—in other words, where the contract stipulates for one of two things in the alternative, the doing of certain acts, or the payment of a certain amount of money in lieu thereof,—equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to his remedy of damages at law."

It has also been held that whenever it appears that the intention of the parties was that the contract should be performed and that a stipulation for liquidated damages or a penalty was inserted merely as a security for such performance, then the contract will be specifically enforced, notwithstanding the contract is alternative in form. 25 Ruling Case Law, p. 231, § 29, and cases cited.

In the notes to 1 Pomeroy's Equity Jurisprudence (4th ed.) p. 852, it is said that by the great weight of authority equity makes no distinction between a provision for a penalty and a provision for liquidated damages so far as the right to the specific performance of the contract containing such provision is concerned, citing a number of cases.

In *Marble Co. v. Ripley,* 10 Wall. (77 U. S.) 339, at page 359 it is said:

"But what is a still more satisfactory reason for withholding a decree for specific performance is, that the party who asks for it has an entirely adequate remedy provided by the reservation in his deed, and by the contract itself. . . . This is a remedy more adequate and full than any decree for specific performance could give him, and it renders such interference of a court of equity entirely unnecessary."

It is no doubt true that specific performance will not be denied in every case where liquidated damages are stipulated, nor granted in every case where a so-called penalty is provided. The vital question is whether or not the parties intended that by the terms of the contract one or both might be released by paying a stipulated sum. Where, by the express terms of the contract, the party may pay damages or convey in the alternative, the rights of the parties are usually plain. In the case at bar no language in the alternative is used. 25 Ruling Case Law, p. 230, § 29.

A contract, after providing for the exchange of certain real estate in the city of Chicago, contained the following provision:

"The wilful neglect or failure by either of the parties hereto to perform his or their respective parts of the undertaking hereunder is to subject such party to the payment of the sum of $1,500 fixed and liquidated damages to the party injured, and upon payment thereof this contract is to become null and void."

It contained a further provision by which each party was to deposit the amount of $1,500 in escrow. One of the parties refused to convey. An action for specific performance was begun, and it was held that specific performance would not be granted. The court said:

"By this contract the sum of $1,500 is not only fixed as liquidated damages to the party injured in case of nonperformance, but it is also provided that upon the payment of that sum the contract is to become null and void. . . . While it is not by express terms made an option contract, the language employed will admit of no other construction. By

electing to pay the penalty instead of complying with the other terms of the contract, and by tendering the money to appellant, appellees exercised the option given them, and the contract, by its terms, became null and void." *Davis v. Isenstein* (257 Ill. 260, 100 N. E. 540) 45 L. R. A. N. S. 52, and note. See, also, *Koch v. Streuter* (218 Ill. 546, 75 N. E. 1049) 21 L. R. A. N. S. 210.

In the present case it is to be noted that the plaintiff reserved the right to cancel the contract if she "finds conditions wrong." In this case, as in *Davis v. Isenstein, supra,* each party agreed to pay as liquidated damages the sum of $500 in case of default. We think under the language of this contract each party reserved the right to withdraw from the contract and upon refusal to convey became indebted to the opposite party in the sum of $500. The language, "if first party finds conditions wrong this contract is void," is ambiguous, but when applied to the situation as disclosed by the evidence it was inserted for the purpose of enabling the plaintiff, if the condition of the Chicago property was not as represented, to cancel the contract and relieve herself from the payment of the $500. If she failed to perform for any other reason the contract was to be binding. Upon the whole case we are satisfied that the right of the opposite party upon the default of one is measured and prescribed by the language of the clause stipulating the amount of the liquidated damages and that the trial court was in error in granting specific performance. In justice to the trial court it should be said that this subject was not urged upon his attention nor was it argued here. If the facts were not all here and the question presented simple and plain, we should follow the customary practice of ordering a re-argument, but we deem it unnecessary in this case.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

A motion for a rehearing was denied, with $25 costs, on February 7, 1922.

KORNWOLF, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

November 16, 1921—February 7, 1922.

Street railways: Collision with automobile: Negligence: Care required of persons driving on tracks: Trial: Instructions.

1. Unless it can be said that contributory negligence on the part of the plaintiff is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, the proper inferences to be drawn must be determined by the jury; but where plaintiff's own evidence conclusively shows contributory negligence on his part a nonsuit will be granted.
2. It was the duty of a driver of an automobile, upon entering street-car tracks and driving lengthwise thereon, to make observation at the time of entry and from time to time thereafter in order to discover an approaching car so as to enable him in time to give way to such car.
3. In an action to recover damages for injury to plaintiff's automobile, evidence showing that plaintiff was traveling lengthwise on a street railway track; that a belated street car, with dim headlights, was proceeding at an excessive rate of speed on its last trip to the car barn; that plaintiff stopped suddenly at the signal of a traffic officer and, looking backward, saw the approaching car and attempted to turn from the tracks; and that the street car, which had sounded no signal, came on with undiminished speed and struck the automobile, is *held* to make plaintiff's contributory negligence a jury question.
4. The refusal of the trial court to submit in the special verdict the question whether plaintiff exercised ordinary care in allowing his automobile to be on the track at the time and place of the collision was not error, every phase of contributory negligence having been covered by instructions with respect to another question submitted.

APPEAL from a judgment of the municipal court of Racine county: E. R. BURGESS, Judge. *Affirmed.*

The appeal is from a judgment entered on December 28, 1920, in favor of the plaintiff and against the defendant for damages and costs, as the result of injuries to plaintiff's automobile.

At the time in question there were located on Douglas avenue, a public street in the city of Racine running north

and south, two sets of tracks used by the defendant in operating its interurban cars between the city of Milwaukee and the city of Kenosha. Going from north to south said Douglas avenue is intersected by the following streets, namely: Kewaunee, Albert, Hubbard, Hamilton, Jackson, and Prospect. The distance between the south line of Kewaunee street at its intersection with Douglas avenue and the nearest crossing of Hamilton street is 1,540 feet; the distance between the south crossing of Hamilton street and the nearest crossing of Jackson street is 245 feet; the distance between the south crossing of Jackson street and the nearest crossing of Prospect street is 156 feet, making the total distance between Hamilton street and Prospect street at their intersection with Douglas avenue 441 feet. Prospect and Jackson streets at the intersection are each forty feet wide; Hamilton street is sixty feet wide; and Hubbard street is sixty-five feet wide. Douglas avenue between Hamilton street and Prospect street is perfectly straight. There is a marked curve on Douglas avenue at the intersection of Hamilton street.

On the 31st day of May, 1920, the plaintiff, together with two other passengers, was returning from Milwaukee to his home in the city of Racine, at 1 o'clock at night, going south on Douglas avenue, in a Chevrolet sedan automobile, and when he reached the intersection of Hamilton street it is claimed by him that he looked north for the approach of an interurban car but failed to observe one, and then proceeded south at the rate of about thirteen miles an hour on Douglas avenue, with his automobile traveling partly within and partly without the west track of the defendant company. To the west of said west track there was sufficient roadway upon which plaintiff could have traveled safely without being endangered by an approaching car coming from the north. As he passed the intersection of Jackson street with Douglas avenue he was hailed by a police officer, who called out to him to put on his lights. The plaintiff did

not understand what the officer said, and thinking that possibly some one had been injured who required the use of an automobile he stopped his car a distance of about fifty feet south of the north crossing of Prospect street. The last car going south, under the schedule of the defendant, was due at the defendant's barns in the city of Racine at 12:40 a. m. Immediately after stopping his car the plaintiff looked back, and then for the first time, a distance of about forty feet to the north of him, saw the defendant's interurban car approaching at the rate of between twenty-five and thirty-five miles an hour. The plaintiff immediately endeavored to remove his car from the tracks, but before being able to accomplish his purpose the collision between the interurban car and plaintiff's automobile was precipitated, resulting in considerable damage to plaintiff's car.

The collision took place on a clear, moonlit night, and the plaintiff testified that without the aid of any artificial lights he could see an object ahead of him quite clearly at a distance of about 200 feet. From computations made, taking into consideration the speed of plaintiff's car when it left Hamilton street, and the distance between Hamilton street and the point of collision, and the rate of speed at which the defendant's car was running, the defendant's car at the time plaintiff crossed the Hamilton-street crossing of Douglas avenue was about 400 or more feet north of the crossing. At the time of the collision there was in force in the city of Racine an ordinance limiting the speed of street cars to twelve miles an hour and making a violation of such ordinance a misdemeanor. Defendant's car had on a dimmed headlight, and plaintiff's car had on its dimmers and the tail light was burning. No gong or other signal was sounded before the collision.

The case was submitted to the jury upon a special verdict, in which the jury answered (1) that the motorman operating defendant's car did not use ordinary care in handling and running the car at the time he was approaching and struck

plaintiff's automobile; (2) that such want of ordinary care was the proximate cause of the damage to plaintiff's automobile; (3) that no want of ordinary care on plaintiff's part proximately contributed to cause the damage in question.

At the close of plaintiff's evidence defendant moved for a nonsuit, which motion was denied by the court. After verdict the defendant moved the court to change the answer of the jury to question number 3 of the special verdict from "No" to "Yes," and for judgment in favor of the defendant and against the plaintiff upon the verdict as so changed; also for judgment in its favor notwithstanding the verdict, and, in the event of a refusal of the court to grant defendant's motions aforesaid, that a new trial be awarded, for reasons which will subsequently be considered.

For the appellant there was a brief by *Simmons & Walker*, and oral argument by *Charles F. Wratten* and *John B. Simmons*, all of Racine.

For the respondent there was a brief by *Whaley & Erikson* of Racine, and oral argument by *Vilas H. Whaley*.

The following opinion was filed December 13, 1921:

DOERFLER, J. Defendant first assigns as error the refusal of the court to grant his motion for a nonsuit.

Unless it can be said that the contributory negligence of the plaintiff was so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, the proper inference to be drawn must be determined by the jury. *Bassett v. M. N. R. Co.* 169 Wis. 152, 170 N. W. 944; *Dahinden v. Milwaukee E. R. & L. Co.* 169 Wis. 1, 171 N. W. 669.

It has also, however, been held: "But, where the plaintiff's own evidence conclusively shows contributory negligence on his part, a nonsuit will be granted." *Rhyner v. Menasha*, 97 Wis. 523, 526, 73 N. W. 41; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 154, 77 N. W. 179.

It was conceded on the trial that there was no necessity for plaintiff driving partially on the tracks, and that there was sufficient space to the west of the tracks and a good roadbed where he could have driven in perfect safety. It was also the duty of the plaintiff, before entering upon the tracks, to look and listen in order to ascertain the approach of a car. Defendant's counsel cited a number of cases applicable to persons driving on the tracks of a steam railroad. Under the decisions of this court a marked distinction has been drawn between cases based on facts similar to those involved in the instant case, where the person travels along and in the street-car tracks, and cases involving the driving onto or crossing of steam railroad tracks. The late Mr. Chief Justice WINSLOW, therefore, in the case of *Kowalkowski v. M. N. R. Co.* 157 Wis. 473, 476, 146 N. W. 801, in the opinion of the court says:

"When, however, the question arises as to the duty of a person traveling upon the street lengthwise of the street railway track, it is plain that there can be no very close analogy between steam railroads operating cars upon their own right of way and street railroads operating cars upon the public street. The difference of situation necessarily creates different standards of conduct. The traveler has no right to travel upon the inclosed right of way, but he has a right to travel upon that part of the highway covered by the street railway track when it is not required for the passage of street cars in the performance of that duty which street-car companies assume to the public."

In the same opinion it is also held:

"The question of ordinary care is generally a relative question, depending upon the facts surrounding each case. For this reason the citation of adjudicated cases is not very helpful, as there is always a difference in the facts."

It was the duty of the plaintiff, upon entering the street-car tracks and in driving lengthwise thereon, not only to make his observation at the time of such entry, but to make frequent observations from time to time in order to dis-

cover an approaching car so as to enable him in time to give way to such car. In the *Kowalkowski Case, supra,* the plaintiff was driving slowly lengthwise along the street-railway tracks with a horse and vehicle, and looked backward within a distance of about each half of a block. The street car was running at an excessive rate of speed and bore at the front thereof only a sixteen candle-power incandescent light, with the reflector on the forward part of the roof. In the opinion in that case it is said:

"It may well be that this comparatively feeble light in the position in which it was would not necessarily attract the attention of a man taking occasional glances backward, or if seen would not be identified as the light of an approaching car."

The testimony in the instant case shows that the defendant's car was running at a rate of speed of from twenty-five to thirty-five miles an hour; that no signal or gong was sounded heralding its approach; and that the speed of the car was not perceptibly diminished before the collision, and that such car bore down upon plaintiff's automobile while running at full speed. Plaintiff did not look backward because he saw the approaching lights of defendant's car, but because he was hailed by the officer at the intersection of Douglas avenue and Jackson street, and in looking around he saw the light of defendant's car and the car approaching at a distance of about forty feet, too late for him to clear the tracks. While the night in question was apparently a clear, moonlit night, it must be assumed that the reflection of the headlight on defendant's car would not be as effective to call attention to the approach of the car under those circumstances as it would on a dark night. It was also a conceded fact that defendant's car was belated, and that at the time of the collision it was overdue at the car barn a period of twenty minutes. Had the plaintiff not been hailed by the officer as detailed by the facts as herein stated, his car while in motion could have, within the period

of a second or two, readily cleared the tracks and thus have avoided the collision; however, it can well be assumed that being hailed at that time of the night by the officer, at the intersection of Jackson street, the plaintiff's first impulse naturally was to stop his car immediately, particularly in view of the thought that he expressed, that some one might have suffered injury who needed immediate attention.

Therefore, in view of the fact that defendant's car was the last car to travel south on the tracks that evening and that it was approximately one-half hour late; that plaintiff was prompted to stop his car by being hailed by the officer as detailed, and in consideration of the excessive speed at which defendant's car was running prior to the collision, and that no signal of its approach had been sounded and no effort made to diminish its speed, we are of the opinion that the question of plaintiff's contributory negligence, under all the facts and circumstances in the case, was one properly to be submitted to the jury.

The fact that the motorman on defendant's car testified that he did not see plaintiff's automobile until the time of the collision is very persuasive in showing that the headlights on the car were very dim, for it is established by the evidence that the tail light on plaintiff's car was burning at the time of the collision.

The fifth assignment of error, based upon the refusal of the court to change the answer of the jury to the third question of the special verdict from "No" to "Yes" and to order judgment for the defendant upon the verdict as so changed; and the sixth assignment of error, based upon the refusal of the court to order judgment in favor of the defendant notwithstanding the verdict; and the seventh assignment of error, based upon the refusal of the court to set aside the verdict and to grant a new trial, are substantially covered in this opinion with reference to the first assignment of error and will therefore receive no further comment herein.

Defendant's counsel requested the submission, as a ques-

tion of the special verdict, whether the plaintiff exercised ordinary care in allowing his automobile to be on the street-car track at the time and place of the collision, and the refusal of the court to submit such question constitutes defendant's second assignment of error.

In *Fandek v. Barnett & Record Co.* 161 Wis. 55, 61, 150 N. W. 537, in an opinion rendered by Mr. Justice VINJE, this language is used:

"The correct practice, however, is to submit only one question on the subject of plaintiff's contributory negligence, but the submission of two partly covering the field and one wholly so, where the answers are consistent, cannot be held prejudicial error."

In connection with question number 3 of the special verdict the court fully covered every phase of contributory negligence involved in this case, and such instructions are in full accord with the opinion in the *Kowalkowski Case* (157 Wis. 473, 146 N. W. 801), and in fact were taken almost bodily from the opinion in that case. Under the circumstances we can see no prejudicial error in refusing to submit the question proposed.

Defendant's counsel also assign, as their third and fourth assignments of error, the refusal of the court to instruct the jury as requested that ordinary care requires a person about to drive onto a street-car track to look and listen at the last opportunity before passing the line between safety and peril; and also in refusing to instruct the jury as requested that a street car is entitled to precedence in the use of the part of the street occupied by its tracks; that other persons using that part of the street should not unnecessarily obstruct the passage of cars, but should keep diligent lookout for cars approaching from either direction and yield the track to them; and that the motorman is entitled to presume they will do so unless the contrary does or should become apparent.

The court in its instructions pertaining to the third ques-

tion of the special verdict instructed the jury that it is the manifest duty of the traveler who chooses to travel along that portion of the street occupied by the street railway tracks to give way in due season to an approaching car, and that it followed necessarily that it is his duty to exercise ordinary care not only to discover when a car is approaching, but to turn off from the track in time to prevent a collision. The court also instructed the jury that from the very nature of the situation a citizen must defer to the street car in using the part of the street necessary in the operation of a street railroad; that a street car necessarily acquires great momentum and cannot be momentarily stopped and cannot turn out. These instructions and others given by the court substantially cover the requested instructions by defendant's counsel, and we therefore hold that no prejudicial error was committed in refusing to give the instructions requested.

From the foregoing the judgment of the lower court must be affirmed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 7, 1922.

WARD, Appellant, vs. BOARD OF TRUSTEES OF RACINE COLLEGE, Respondent.

November 17, 1921—February 7, 1922.

Bill of exceptions: Extension of time for settlement: Adequate excuse: Discretion of court: Affidavits of persons having personal knowledge of facts: Fraudulent representations inducing contract: Failure of consideration.

1. Although the court has power to settle a bill of exceptions after the year within which an appeal may be taken has expired, the power should be exercised with caution and only in cases where the parties have brought themselves clearly within the

rule, and should not be so exercised as to extend the time within which the rights of parties may become fixed in cases where the default is due to unexcused delay.

2. Upon application to enlarge the time for settling a bill of exceptions, the application should be supported by the affidavit of persons having personal knowledge of the facts.
3. Mere unexcused lapse of time should not avail a party seeking to extend the time, and trial courts should not deem the application in any way personal because a denial may prevent a review of one of its judgments. Parties should be held to a strict rule, otherwise the constitutional right to obtain justice without delay (sec. 9, art. I, Const.) may be defeated.
4. The discretion vested in trial courts to excuse defaults should be exercised only where good and adequate cause is shown by the affidavits of persons having personal knowledge of the facts.
5. In an action against a denominational college for services in prosecuting a "quick fund-raising campaign" to provide the college with an endowment fund, the evidence is *held* to show that plaintiff induced the making of the contract by falsely representing that he had a "system" which was his personal property and was unique, and that there was a complete failure of consideration.

APPEAL from a judgment of the circuit court for Racine county: W. B. QUINLAN, Judge. *Affirmed.*

Contract. The complaint alleges that the plaintiff was engaged in the business of promoting and carrying on fund-raising campaigns for hospitals, churches, colleges, etc., and on July 5, 1918, had entered into a contract with the defendant to furnish its system and two representatives to conduct a campaign for the defendant to start not later than July 8th, plaintiff's compensation to be $250 per week, payable weekly. The contract, which was annexed to the complaint, after describing the parties and reciting that defendant wished to raise not less than $300,000 and desired to procure the services of the company, *R. H. Ward*, as doing business under the style of the Ward System Company, to institute and carry on a quick fund-raising campaign, contained the following:

"That the said company shall furnish to the said parties

of the second part the use, for and within the *service territory of Racine College,* the said company's quick fund-raising system, and the services of two of the representatives of said company; the said quick fund-raising campaign to start not later than July 8th and to continue for a period not less than twelve (12) weeks."

Another paragraph provided:

"That the said company shall, to the best of its ability, conduct said quick fund-raising campaign, and while operating same along its own well-specified lines will at all times be open to receive suggestions from said parties of the second part, and will act favorably upon such suggestions as in the judgment of the representatives of the company and the parties of the second part shall deem to be wise and for the best interests of the campaign."

There were other provisions as to furnishing of rooms, banners, and other paraphernalia ordinarily used in campaigns of this character, and other provisions not material upon this appeal.

The complaint further alleged that the contract was extended; that the plaintiff furnished the use of its working system and two representatives for sixteen weeks for the agreed compensation of $5,600, of which $1,750 was paid.

The defendant admitted the making of the contract, the payment of the $1,750, and put in issue the remaining allegations of the complaint, and then alleged by way of defense and counterclaim that the plaintiff falsely represented to the defendant, prior to the execution of the contract, that he was possessed of a wonderful system for the raising of funds for educational and charitable institutions; that the system he used had been devised by him and was his own property; that the system had never failed and could not by any possibility fail; that the defendant signed the contract in reliance upon such representations. Further alleged that such representations were untrue; that the defendant failed to launch or prosecute a campaign, and demanded judgment for $1,750 and an additional sum for expenses, amounting in all to the sum of $2,354.23.

Upon the trial the court made and filed findings of fact, and, because the facts cannot be more clearly or succinctly stated, we set out the findings material on this appeal *in extenso:*

"Fourth. That at and prior to the date of said contract [July 5, 1918] the defendant was in straitened financial circumstances, wholly without endowment, except that certain bequests had been made to it in trust for purposes having reference to its connection with and relation to the Episcopal Church, and was having great difficulty to meet its annual budget of necessary expenses, and those having the responsibility of its management were desirous of raising a large fund, not less than $300,000, as set forth in said 'Exhibit A,' for the purpose of putting it upon a better financial footing, and providing it with a permanent endowment fund; and this condition of its affairs as well as its character and connection as an Episcopalian College were well known to the plaintiff at and prior to the time of signing said contract, 'Exhibit A.'

"Fifth. That in order to induce defendant to enter into contract with him, the plaintiff represented to defendant that he was possessed of a system or method for raising money by voluntary gifts or contributions which was private and peculiar to himself, the same being designated by him the 'Ward Systems Company's Quick Fund-Raising System,' which was most effective and uniformly successful and was operated along his own peculiar and well defined lines, by the use of which defendant would surely achieve its desire;—and proposed to defendant to furnish for a consideration the use of said 'System' and the services of two experienced expert representatives to conduct a quick fund-raising campaign on behalf of Racine College, stating at the same time, in substance, that the details of said system were peculiarly his own and could not be disclosed until after the contract was signed.

"Sixth. That defendant entered into the contract 'Exhibit A' mentioned in and attached to the complaint, in reliance upon the truth of said representations.

"Seventh. That said representations were untrue in this, that plaintiff was possessed of no system as represented, which was devised by, or was in any way private, individual, or peculiar to himself, or which was new or unknown, or in

which he had any proprietary rights or right or power of disposal, and said plaintiff never at any time disclosed to the defendant or furnished for its use any system, device or method for raising funds, except that method, long a matter of common knowledge and practice, viz.: that of securing a volunteer committee of citizens to direct the work and appointing teams of solicitors to do individual canvassing.

"Eighth. That plaintiff sent two representatives to Racine, ostensibly to perform said contract and conduct the quick fund-raising campaign therein provided for, but although the defendant furnished the plaintiff with all the facilities necessary or called for, provided a headquarters and plenty of stenographers and typewriters, with adequate postage, supplies, banners, posters, and other advertising matter as required or ordered by plaintiff, said plaintiff did not at any time launch or prosecute any 'quick fund-raising campaign,' as stipulated in said contract, or any money-raising campaign whatever, but his said representatives spent four or five weeks' time examining the archives of the college and making a partial list of alumni, of which no use was made by him or them, and at the end of twelve weeks they had barely completed the selection of an executive committee of citizens, which committee, after several conferences with plaintiff's representatives, and with plaintiff's sanction and approval, notified the defendant that before they could formulate plans it would be necessary for defendant to secure an amendment of its charter so as to remove the denominational qualifications for membership upon its board of trustees, and, thereby change its character as an Episcopalian school or college."

"Eleventh. That plaintiff wholly failed to perform and carry out the stipulations of said contract on his part, as therein expressed.

"Twelfth. That defendant, before becoming aware of plaintiff's misrepresentations and in reliance upon said representations and in good faith believing and expecting that plaintiff would perform said contract, paid to said plaintiff on account the sum of $1,750, and also paid out and expended for salaries of stenographers and for postage, stationery, and other supplies, and for posters, banners, and other necessary expense incurred at plaintiff's special instance and request in preparation for the said quick fund-

raising campaign, the further sum of $604.23, making in all the sum of $2,354.23 so paid out and expended by plaintiff, all of which was a total loss to the defendant and for which it received no consideration."

Judgment was entered for the defendant, from which the plaintiff appeals.

Subsequent to the entry of judgment and on August 18, 1920, other proceedings were had which are brought here by an appeal by the defendant and are considered herewith.

August 31, 1920, notice of entry of judgment was served.

October 28, 1920, exceptions were served and filed.

March 19, 1921, the defendant, in an effort to collect its judgment, commenced a garnishment action.

May 13, 1921, an order was procured for substitution of attorneys.

On May 16, 1921, an application was made to the attorneys for the defendant to extend the time for settling the bill of exceptions. This request was denied.

July 20, 1921, an *ex parte* order was entered enlarging time for filing the exceptions to a period of thirty days from the date of the order.

July 23, 1921, the appeal was taken from the judgment and the record transmitted to the supreme court, no bill of exceptions being included.

July 23, 1921, the plaintiff attempted to serve a proposed bill of exceptions.

On August 12, 1921, the court vacated the *ex parte* order of July 20, 1921, and on August 17, 1921, an order was entered on motion enlarging the time for thirty days for filing exceptions and serving a bill of exceptions and making previous filing of exceptions and attempted service of bill of exceptions effective from the date of notice of entry of the order.

August 19, 1921, notice of entry of order was served, and on the 29th day of August, 1921, the defendant appealed from the order.

For the appellant there was a brief by *Geo. W. Kretzinger* of Chicago and *Walter D. Corrigan* and *M. K. Whyte*, both of Milwaukee, and oral argument by *Mr. Corrigan* and *Mr. Kretzinger.*

For the respondent there was a brief by *Simmons & Walker* of Racine, and oral argument by *John B. Simmons.*

The following opinion was filed December 13, 1921:

ROSENBERRY, J. We shall first consider the question raised by the appeal of the defendant from the order entered August 17, 1921. The defendant claims that the court erred in two respects: First, in enlarging the time against objection so as to permit the filing of exceptions and the service of a bill of exceptions after the expiration of the time allowed for appeal; and second, in granting an enlargement of the time, no good cause therefor being shown.

Upon the oral argument the defendant, for sufficient reasons, waived any claim under the first assignment of error, and we shall not further consider it.

In *Behnke v. Kroening*, 174 Wis. 224, 182 N. W. 837, it was held that the court had power to settle a bill of exceptions although the year within which an appeal might be taken had expired. It is a power which should be exercised with caution and only in cases where the parties have brought themselves clearly within the rule, and should not be so exercised as to extend the time within which the rights of parties may become fixed in cases where the default is due to unexcused delay.

In this case there is no affidavit from any one connected with the case prior to the substitution of attorneys on May 13, 1921. The plaintiff was advised of the adverse decision and an appeal recommended on August 10, 1920. On September 22d plaintiff's agent, Joannis, wrote to Mr. Hardy that the plaintiff was "seriously considering" an appeal. Mr. Hardy, being a Wisconsin lawyer, must have known that a bill of exceptions should be settled within sixty

days or the time therefor extended. Just when this fact was drawn to the attention of the plaintiff's Chicago attorney does not appear, but on December 24, 1920, Mr. Kretzinger wrote Mr. Hardy "to complete the record, including transcript of evidence." No effort was made to settle the bill, nothing was done until the defendant sought to enforce its judgment by garnishment, and even then the proceedings in the case do not indicate that it was pushed forward with very great expedition.

In *Schluckebier v. Babcock,* 104 Wis. 293, 80 N. W. 435, where there was an unexcused delay of six months, a motion to enlarge the time to serve the bill of exceptions was held properly denied.

In *Colle v. K., G. B. & W. R. Co.* 149 Wis. 96, 135 N. W. 536, want of satisfactory explanation of a delay of five months was held sufficient ground for denial of motion to enlarge time.

In *Breen v. Kennedy,* 158 Wis. 48, 147 N. W. 996, motion made fifteen months after notice of entry of judgment, time for appeal then being two years, was held to justify the court in denying motion to settle the bill, although a transcript of the evidence had been paid for.

We again call attention to the rule that upon applications of this character the application should be supported by the affidavit of persons having personal knowledge of the facts. *Superior C. L. Co. v. Dunphy,* 93 Wis. 188, 67 N. W. 428.

The whole case being here upon the merits, the court has concluded not to determine the question raised on the appeal from the order, but we take this occasion to observe that there is every reason for holding parties to a reasonably strict compliance with the rule. In recent years much has been said and written in regard to the delays incident to litigation, and it is only by the firm application of procedural rules by the trial courts that such delays can be prevented. Mere unexcused lapses should not avail a party, neither should trial courts take the view that the application for an

order to extend the time within which a bill may be settled is in any way personal to them because it may result in the denial of a right of appeal from a judgment of the trial court. The question presented is much larger than that. It relates to the whole scope of the administration of the law, and if parties are not held to a reasonably strict rule one of the fundamental purposes of our system of jurisprudence, which, as declared by sec. 9, art. I, of the constitution, is that "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws," will be defeated.

There is no presumption that injustice is done a litigant by the judgment of the trial court. By statute he is given a right to a review, and the procedure by means of which such review may be had is prescribed and it should be adhered to in order that the constitutional declaration may be made effective. While discretion is vested in trial courts for the relief of parties who, by reason of some excusable fault or neglect, have been deprived of the right given them, it should be exercised only where good and adequate cause is shown by the affidavits of persons having personal knowledge of the facts, and where there is a delay for which no substantial, adequate reason is shown the party in default should not be relieved.

Upon the plaintiff's appeal it is strongly argued that the evidence does not sustain the findings of the trial court that the representations made by the plaintiff to the defendant were untrue and that the making of the contract was induced thereby. We shall not attempt to discuss or set out the entire evidence. Having in mind the rule that fraud must be established by clear and satisfactory evidence, we have carefully examined the record and are of opinion that the evidence amply sustains the trial court's findings. The main controversy relates to the so-called "system" of the

plaintiff, which was represented by the plaintiff to be his personal property, that it was a system of raising money by voluntary gifts or contributions which was private and peculiar to himself and was of such a character that it could not be disclosed until after the contract was signed. The evidence discloses no system in which the plaintiff had any property rights whatever. It was identically the method followed in most of the liberty loan and other money-raising campaigns during the war. The plaintiff offered evidence to show that it consisted of four things:

First, the auditing of all the assets of the institution for which the campaign was to be made. This appears to be nothing more than making a list of the names of the alumni and others who were most likely to contribute.

Second, the classifying and grouping of all the various factors which the plaintiff might discover and the education of the people involved by a process of publicity, specialized and general. There was nothing more nor less than the ordinary publicity campaign with a grouping of the various "assets" which were disclosed by the so-called audit.

Third, the creation of public sentiment throughout the entire territory involved by speaking before special groups, and special literature sent out to the individuals. The creation of a public sentiment and furnishing printed matter in regard to the object and purposes of the campaign is an inseparable incident to every campaign.

Fourth, the development of teams under the committees already grouped in the first part of the process by means of which the money will be finally gathered together for the institution. This means no more nor less, as applied, than the procuring of volunteers to circulate subscription lists. No new or novel plan was disclosed, and the plaintiff had no property right in any of the methods adopted, which were those in common use.

By the plaintiff's testimony upon the trial it appeared:

"The peculiar feature of our campaign work is that we give it time exposure sufficient to allow the reaping of the

greatest amount of money from the territory. We operate by a system of twenty-one forms which we put in operation in five groups, each group playing its part at certain starts of the campaign. In that way allowing sufficient time to develop the territory. We differ from any other organization in the world."

It does not appear what the "time exposure" was. It remains a secret so far as this record discloses. Nor was the nature and character of the "twenty-one forms" explained to the defendant or at the trial.

It was represented to the defendant, claimed upon the trial below, and argued here, that the plaintiff has a system. We have carefully examined the evidence and agree with the trial court that there was none. The whole scheme seemed to be an effort on the part of the plaintiff to interpose himself between the defendant and its patrons for the purpose of enriching himself from such contributions as the defendant might receive. The representations, as the trial court found, were untrue. That Dr. Rogers, in executing the contract for the defendant, relied upon the representations, is too clear to admit of argument. A majority of the court are also of the opinion that there was a complete failure of consideration. The plaintiff had nothing to deliver and delivered nothing, and created a situation by reason of which it became necessary to entirely abandon the campaign without the raising of a single dollar.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on February 7, 1922.

GRIFFIN, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

November 17, 1921—February 7, 1922.

Appeal and error: Affirmance by divided court.

Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment appealed from will be affirmed.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Alexander & Burke* of Milwaukee, and for the respondent on that of *Simmons & Walker* of Racine.

The following opinion was filed December 13, 1921:

DOERFLER, J. Mr. Chief Justice SIEBECKER, by reason of illness, was unable to participate in the decision of this case. The other six Justices of this court who participated in the decision on this appeal are equally divided in opinion as to the correctness of the judgment entered in the trial court and appealed from to this court. Three of such Justices are of the opinion that the judgment appealed from is correct and should be affirmed, and three of such Justices are of the opinion that such judgment should be reversed. This, under the rule, requires an affirmance of the judgment awarded by the trial court. *Hagenah v. Milwaukee E. R. & L. Co.* 136 Wis. 300, 116 N. W. 843, and cases there cited.

By the Court.—It is so ordered.

A motion for a rehearing was denied, with $25 costs, on February 7, 1922.

GUENTHER, Appellant, vs. RUTKOWSKI, County Treasurer, and others, Respondents.

November 18, 1921—February 7, 1922.

Drains: Assessment of benefits: Failure to award damages: Jurisdiction of supervisors: Appeal from void order: Waiver of jurisdictional defect: Laches: Equitable relief.

1. In proceedings to establish town drainage systems, sec. 1362, Stats. 1917, which provides that the town supervisors "shall award just damage to each piece of land damaged by the proposed work," must be substantially followed. Where damages are shown they must be separately assessed, and a failure to do so results in a loss of jurisdiction.
2. The supervisors having lost jurisdiction by such failure to assess and award damages, a party's appeal to the county court from the order of the supervisors did not invest them with jurisdiction, and commissioners appointed by the court to hear the appeal acquired none.
3. Where plaintiff mistook his remedy when he appealed from the order assessing benefits, there being no jurisdictional order to appeal from, the appeal did not operate as a waiver of the right remedy.
4. An order assessing benefits from the construction of a drain but not assessing damages as required by sec. 1362, Stats. 1917, though damages are shown, may be attacked directly by a suit in equity or collaterally, the remedy by *certiorari* not being adequate.
5. Plaintiff having seasonably called attention to a jurisdictional defect in the proceedings, and having protested on appeal, taken before the work was begun, he is not guilty of such laches as to defeat his right to equitable relief against the assessment. *Cotzhausen v. Dick*, 138 Wis. 127, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action in equity to set aside a special tax levied upon plaintiff's land as a benefit in a drainage proceeding. Plaintiff claims the supervisors lost jurisdiction because they failed to assess him damages resulting from the widening and deepening of the main ditch running through his land. His benefits were assessed at $123.53. From the order of

the supervisors assessing benefits and failing to assess damages he appealed to the county court. The commissioners appointed by the county court, after hearing the parties and plaintiff's evidence as to damages by reason of the taking of his land and the increased area of spill banks or the cost of spreading them over his land and the consequent loss of hay crops for a year or two, amounting in all, as shown by him, to from $100 to $200, affirmed the order of the supervisors. No damages were assessed to any of the owners of land through which the ditch ran. The appeal was taken before work was begun on the ditch, but it was not determined till after the work was completed. The ditching was being done with the knowledge of plaintiff. The trial court held that plaintiff was guilty of laches in not restraining the work and hence equity should not aid him, and entered judgment dismissing his complaint, from which judgment he appealed.

For the appellant there was a brief signed by *A. A. Cooper,* attorney, and *Walter H. Bender,* of counsel, both of Milwaukee, and oral argument by *Mr. Cooper.*

For the respondent *Town of Oak Creek* there was a brief by *Perry & Perry* of Milwaukee, and oral argument by *Charles B. Perry.*

The following opinion was filed December 13, 1921:

VINJE, J. It is evident that plaintiff suffered some damage to his land by reason of the widening and deepening of the ditch through his land. About a quarter of an acre more land was taken by the ditch itself, which the evidence showed was worth about $37.50; that the spill banks would cover nearly two acres, and if spread would involve expense and loss of crops for some time. Sec. 1362, Stats. 1917, provides that the supervisors "shall award just damage to each piece of land damaged by the proposed work." This they failed to do, though plaintiff claimed before them that he was damaged. The benefits or cost of construction

is a special assessment, and we cannot upon this record assume that any damages were deducted from plaintiff's assessment of benefits, for it shows none. Where damages are shown they must be separately assessed, and a failure to do so results in a loss of jurisdiction on the part of the supervisors to proceed because the statute in this respect must be substantially followed. *Fraser v. Mulany,* 129 Wis. 377, 109 N. W. 139; *Pederson v. Chipman,* 167 Wis. 348, 167 N. W. 449.

It is argued by respondents that plaintiff by appealing conceded the validity of the order appealed from and therefore cannot now claim it is void. The trouble with the argument is that parties to a statutory proceeding cannot invest the acting body with jurisdiction where it has lost it by a failure to follow the statutory requirements. And since the supervisors lost jurisdiction the commissioners on appeal acquired none. *Steen v. Norton,* 45 Wis. 412; *Berger v. Discher,* 146 Wis. 170, 131 N. W. 444. Moreover, their action, as shown by the record, was a denial of plaintiff's claim for damages in the face of evidence and facts showing beyond dispute some substantial damage.

It is evident that plaintiff mistook his remedy when he appealed, because there was no jurisdictional order to appeal from. He should have brought an equitable suit to restrain further threatened action. But the fact that he mistook his remedy did not operate as a waiver of the right remedy. *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1; 10 Ruling Case Law, p. 396. Such jurisdictional defect as here existed may be attacked directly by a suit in equity or collaterally, since *certiorari* is not an adequate remedy. *Fraser v. Mulany,* 129 Wis. 377, 109 N. W. 139.

Should equity deny relief on the ground of laches? Respondents claim it should, and rely, as no doubt the trial court did, on the case of *Cotzhausen v. Dick,* 138 Wis. 127, 119 N. W. 822. In that case plaintiff did nothing until after the ditch was dug, though he had notice of the pro-

ceedings, and in that case there was no loss of jurisdiction but a mere irregularity in the proceedings. Here plaintiff objected before the supervisors made the order for the proposed ditch and called their attention to the jurisdictional defect, though he may not then have regarded it as such. Again before the commissioners he asserted his right to damages and protested that they had no right to proceed without an award thereof. So the case is not parallel in its facts with the case cited.

We incline to the view that where a party seasonably calls attention to a jurisdictional defect, though he does not name it as such, and continues to protest upon an appeal taken before the work is begun, he cannot be said to have been guilty of such laches as to defeat his right to equitable relief. He has not slept upon his rights, as did the plaintiff in *Cotzhausen v. Dick,* 138 Wis. 127, 119 N. W. 822. On the other hand he has vigorously asserted them in an ineffectual manner. Such assertion, however, should be taken into consideration when it comes to the question of laches, for that is determined by conduct. The fact that he first mistook his remedy did not operate to waive the true remedy he had. His grievance has always been the same—a failure to get damages,—and that grievance he brought home to the supervisors seasonably and to the commissioners later. It is for the selfsame grievance he now seeks redress, and we conclude he has not lost his right thereto. This conclusion necessitates a reversal of the judgment and further proceedings for the recovery of the tax paid as provided by statute. Secs. 1210*h*—1 *et seq.*

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

A motion for a rehearing was denied, with $25 costs, on February 7, 1922.

MEYER, Plaintiff in error, vs. THE STATE, Defendant in error.

November 18, 1921—February 7, 1922.

Homicide: Murder in first degree: Sufficiency of evidence: Argument to jury: Prosecutor characterizing nature of crime.

1. In a prosecution for murder, evidence conclusively establishing that the deceased, the wife of the defendant, had met her death by blows upon the head, and that her body was placed in the basement of their home before a fire which destroyed the house had touched the body, together with evidence pointing to a number of more or less suspicious circumstances connected with the conduct of the defendant, is *held* to sustain a conviction of murder in the first degree.
2. Where the accused disclaimed all knowledge of the crime, so that no room was left for any question of accident, heat of passion, or other inadvertence, the defendant was either guilty of murder in the first degree or not guilty.
3. A statement of the district attorney, in arguing to the jury, that "There isn't any of the crimes the Huns have committed that is more atrocious than the crime this man has committed," was not prejudicial error as asserting that the accused was not only guilty, but that he was guilty of a most heinous crime, as the characterization of the crime was a matter upon which minds might well differ.

ERROR to review a judgment of the circuit court for Jackson county: JAMES WICKHAM, Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, was convicted of the crime of murder in the first degree on June 15, 1918, and sentenced to life imprisonment. To review such sentence he sued out a writ of error.

Loren Risk of Minneapolis, Minnesota, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General* and *J. F. Baker,* assistant attorney general, and oral argument by *Mr. Baker.*

The following opinion was filed December 13, 1921:

VINJE, J. Defendant, his wife, Margaret, and two boys lived upon a farm in Clark county. On Thanksgiving eve-

ning 1918, at about 10 o'clock, some of defendant's neighbors discovered that his house was on fire, and upon reaching it they found him outside making no effort to get into the bedroom where, upon being questioned, he claimed his wife was. The house burned down completely, and the next day, after large quantities of water had been poured upon the burning débris, the body of his wife was found in the northeast corner of the basement under about two feet of burned material and ashes on the basement floor with nothing under it except a small board that was not burned to any extent. The upper part of the body was considerably burned but the lower part was not, showing the body was in the basement before the fire began. That is further substantiated by witnesses who saw a hole burned in the bedroom floor and watched objects fall through it to the basement, but saw no body fall through though they looked for it. A *post-mortem* showed that her skull had received three severe blows from some blunt but compact instrument before death, one causing a stellar fracture of the skull at the occipital bone, one a fracture of the skull on the right side breaking the bone at the base of the ear, the right eye socket, and breaking the cheek bone in two places. Any one of these two blows would cause instant unconsciousness and certain death. The other blow on the left side of the head was not so severe though it might cause death. The tissues around the blows were infiltrated with blood and showed such an amount of hemorrhage that it was certain they were inflicted while the heart was still beating and the circulation of the blood in progress. So it was conclusively established that she met her death by blows upon the head and that the body was in the basement before the fire touched it.

Upon the evening in question the defendant's two sons had gone to a dance and he and his wife had taken one Woodkey from a place some eight or ten miles away to their house, which they reached about 9:20. Woodkey left for his home a short distance away, the wife started for the house and the defendant for the garage with the car. From

that time till the neighbors came upon discovering the fire the defendant and his wife were alone. He claims he put the car away, went into the kitchen for some warm water to doctor a sick horse, and remained in the barn till a short time before the neighbors came. He thinks he must have dozed for a short time while watching the sick horse. It was fairly well established that there was no sick horse. Among a number of more or less suspicious circumstances were these: He made no effort to get to his wife, who he claimed was in the bedroom. Next day he made no effort to put out the burning débris, and when the neighbors began to pour water over the place where the body lay he asked them to stop because the water would crack and spoil his basement wall. When they continued he stopped the gasoline engine that pumped the water. The valuable papers that had been kept in the house were found in the garage with blood on them. He did not want to notify relatives of her death, and would not talk about the fire unless questioned. A number of his explanations were refuted by the evidence. His theory was that his wife had gone to the basement with a lamp, had fallen, and so the fire was set to the house. But the evidence showed that there was no fire in the basement when the neighbors came. On the other hand, the lower part of the house was filled with sheets of flame without much smoke. It is also a verity established by the *post-mortem* examination that the deceased could not by a fall have received three such serious injuries to the skull. They could not have been self inflicted and could not have been the result of accident, but must have been inflicted by some one other than herself.

Defendant was about fifty years of age and his wife some seven years older. They had not lived very amicably, owing in part, as she had claimed, to his habit of drink, his laziness, and failure to get ahead. They had quite often quarreled about money matters, part of their farm was in

her name, and she had been much opposed to his late purchase of the automobile.

These are some of the salient facts disclosed by the record. We have read all the evidence contained therein because of the insistent claim of defendant's counsel that it did not sustain a conviction.

In passing sentence the trial court sought to elicit from the defendant the fact that perhaps the killing was done in a heat of passion as the result of some quarrel, but the defendant disclaimed any knowledge of the crime, whereupon the court said: "The jury have found you guilty of one of the most brutal crimes that a man can be guilty of. I am fully satisfied on the evidence that they were justified in doing so." A careful reading of the evidence has also satisfied us that the verdict was a just one.

The charge to the jury was full and not only correct in law but very favorable to the defendant in that it emphasized their duty not to convict unless they were satisfied from all the evidence beyond a reasonable doubt that the defendant was guilty. The exceptions taken to it, when considered in connection with the whole charge, have no basis in law and will not be separately treated.

Under the evidence the trial court correctly held that the defendant was either guilty of murder in the first degree or not guilty. If the injuries found upon the body of the deceased were inflicted by him, then the evidence left no room for accident, heat of passion, or other inadvertence. The jury in that case were bound to assume that the defendant intended the probable and natural result of his acts. Such result was death. So the evidence left only two alternatives: guilty as charged or not guilty.

In arguing to the jury the district attorney said: "You have heard about the atrocious crimes committed by the Hun over there, but, gentlemen of the jury, there isn't any of the crimes the Huns have committed that is any more

atrocious than the crime that this man has committed." Exception is taken to this language by the defendant on the ground that it asserts him not only to be guilty but to be guilty of a most heinous crime. The jury well understood that the district attorney's declaration of guilt was based upon the evidence before them, and they were instructed by the court that if they found him guilty such finding must be based upon the evidence. Whether or not the district attorney properly characterized the nature of the crime committed by the defendant, if guilty, is a matter upon which judgments of men may well differ. The district attorney gave them his view of it, and the trial judge gave his view as stated. It cannot be said that the language used by the district attorney constituted prejudicial error.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on February 7, 1922.

RICHTER, Administrator, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

December 16, 1921—February 7, 1922.

Federal employers' liability: Car repairer returning from interstate employment: Contributory negligence: Boarding moving train: Proximate cause: Reasonable anticipation.

1. A railroad employee sent from one city to another to make repairs on cars being used in interstate commerce was engaged in "interstate commerce" when, having finished the repairs and on his return to report to the foreman, he was killed by a passenger train on another track while attempting to board a moving freight train.
2. Under the federal Employers' Liability Act, contributory negligence of the injured employee, if his negligence and that of defendant proximately concur in causing the injury, is not a complete defense but only a ground for apportionment of damages.

3. In the absence of proof that the employee had previously been permitted to ride upon a freight engine contrary to a positive rule of the railroad company, the jury was not justified in deciding that it was the duty of the engineer to stop the engine for the purpose of permitting him to get aboard and to ride to another city where it was his duty to go.
4. In actions of this character the plaintiff must prove not only that defendant was negligent, but also that such negligence was the proximate cause of death.
5. The rule that one whose wrongful act causes the doing of another act which results in injury is responsible for the consequences which flow from the latter act is based upon the fact that the wrongdoer, using reasonable diligence, should have foreseen the result; but it is not necessary that the injury in the precise form in which it in fact resulted should have been foreseen.
6. The failure of the engineer to stop his slowly moving engine which the employee was intending to board is *held* not a proximate cause of the death of such employee, as the engineer was not bound to anticipate that the employee would attempt to put his tools on the pilot or that he would become so overbalanced as to fall or step on the other track; the movements of the employee being all unforeseen by and beyond the control of the engineer.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Reversed.*

The deceased, Kasper Wulz, was employed by defendant as a car repairer at Corliss, Wisconsin. On the morning of July 24, 1917, he was sent to Truesdell, Wisconsin, to repair two cars which had come from some place in Illinois. He carried with him a crowbar, two jacks, and a pail containing brasses used as bearings in journal boxes.

Having finished repairing the cars, he collected his tools and walked southward from the platform of the station toward a freight train which was slowly approaching from the south. He walked down the center of the same track; then stepped to the west side of the track between it and the track on which a passenger train was coming from the north. When the freight train reached him he placed his pail upon the engine pilot, and, a moment later, walked beside the pilot and attempted to push the pail to a more secure position.

At this point there is a double track. The passenger train was approaching from the north at a speed in excess of forty miles an hour. Deceased stepped or stumbled upon the other track and was struck by the pilot-beam of the approaching engine and killed. The witness who had the best opportunity to see how the accident happened testified as follows:

"I was employed by the Milwaukee road in July, 1917, and recall an accident happening to one Wulz near Truesdell, Wisconsin. I was employed as a brakeman on a freight train. I was the head brakeman and I was sitting on the front seat on the fireman's side looking out of the window. I saw the accident. I saw the man coming across the track, and he had a crowbar and two jacks on the end of the crowbar over his back, and a pail; I cannot describe what was in the pail, but according to the heft of it there must have been some brasses and waste in it, and he tried to put the pail on the front of the engine, and in doing so he did not get it on quite enough, and as the engine went by him a little ways he turned around and tried to run after it again and put it back on; push it on further, facing towards the front of the engine; and in doing this he kind of got up close to it and stood up straight, and by doing this he tipped the crowbar with the two jacks on his back, up. The crowbar slipped off. The jacks kind of slipped back on the crowbar and overbalanced him, which balanced him back towards the track which '24' was coming up. I hollered at him, but he couldn't hear me, and it was already then too late. He was too far, it didn't do any good. I was looking directly at him all the time. I never kept my eye off of him from the time I saw him until I went back to look at him. I yelled as loud as I could. The window was open. His feet were at an angle. He had one foot over the rail and one on the other side. That was the time he hit him, leaning this way, facing the passenger train '24.'"

It is undisputed that the cars repaired were being used in interstate commerce; that Wulz had completed the actual repairing and was returning to his regular place of employment; and that as Wulz approached the train the engineer

told the fireman to assist him to board the engine. The engineer saw the approaching passenger train and saw Wulz walking between the rails, and when Wulz disappeared from view (by reason of his stepping between the two tracks) he did not attempt to stop the train until told by the fireman that a man had been struck.

The substance of the jury's findings was as follows: That the engineer of the freight train was negligent in not stopping to allow Wulz to board the engine; that the death was caused by such negligence; that the negligence of Wulz proximately contributed to his death, and was forty per cent. of all the negligence of Wulz and the engineer; that Wulz assumed the risks incident to going between the tracks; and that the pecuniary loss suffered by his widow was $6,000. The trial court held that Wulz at the time of his death was engaged in interstate commerce.

Plaintiff moved for judgment on the verdict for $6,000 for the reason that the evidence showed that deceased was not engaged in interstate commerce at the time of his death, and in the alternative, if that motion be not granted, to change the answer finding that Wulz had assumed the risks incident to going between the tracks to "No," and for judgment for $3,600. The latter motion was granted and judgment was ordered accordingly.

There was no claim of negligence in the management of the passenger train. It was undisputed that when the engineer of the freight train saw the deceased approaching his slowly moving engine and coming along the center of the track, he blew the whistle, and that the brakeman, who was seated in the fireman's seat, shouted a warning to the deceased. The bell was ringing and the whistle was blowing on the passenger train. When the engineer of the freight train thought that Wulz intended to get on the engine he told the fireman to help him. It was expected that deceased would try to get on the engine on the east side where there was no danger of any passing train. Instead of doing so

he went on the left side between the main tracks. It is difficult to locate from the testimony the exact place where the accident happened, and in view of the other testimony it may not be material.

Different inferences were drawn by witnesses concerning a signal given to Wulz. From some of the evidence it might be inferred that a signal was given to board the train, but the engineer testified that it was to give warning of the danger.

For the appellant there were briefs by *H. J. Killilea* and *Rodger M. Trump,* both of Milwaukee, and oral argument by *Mr. Trump.*

W. C. Seefeld of Milwaukee, for the respondent.

JONES, J. It was alleged in the complaint that both Wulz and the defendant were engaged in interstate commerce. But it is now claimed by plaintiff's counsel that the federal act does not apply. The cars on which Wulz worked were engaged in interstate commerce. Although deceased had finished repairing the cars, it was early in the day, and he was on his return to report to the foreman when the accident occurred.

We are convinced that the trial court was right in holding that Wulz was engaged in interstate commerce at the time of the accident. In the trial court plaintiff relied on *Ill. Cent. R. Co. v. Peery,* 242 U. S. 292, 37 Sup. Ct. 122, where the conductor, on a south-bound trip, where he was injured, was on a train doing interstate business, and on the return trip (south) was on a train engaged in purely intrastate business. The court held that the trips out and back were distinct, in opposite directions, and with different trains, and that the case did not come within the provisions of the federal act.

In the present case the return of Wulz from his work in interstate commerce was but a continuation of the task he had to perform when he started from Corliss and not completed until he reported back at Corliss for further instructions. It is not necessary that the workman be working

upon a car or siding or on a train engaged in interstate commerce when the injury is received in order to bring him within the provisions of the federal act. If the act performed when the injury occurs is upon an indivisible task connected with interstate commerce, it is sufficient.

The principle is well illustrated in a recent case where the court said:

"In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R. Co. v. Zachary,* 232 U. S. 248, 260, 34 Sup. Ct. 305. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance." *Erie R. Co. v. Winfield,* 244 U. S. 170, 37 Sup. Ct. 556; *Shanks v. D., L. & W. R. Co.* 239 U. S. 556, 36 Sup. Ct. 188; *Erie R. Co. v. Welsh,* 242 U. S. 303, 37 Sup. Ct. 116.

The decision of the question whether the employment was within the federal act is necessary, since under that act, if the negligence of plaintiff and defendant proximately concur in causing the injury, contributory negligence on the part of plaintiff is not a complete defense; it is only a question of apportionment of damages. *Kalashian v. Hines,* 171 Wis. 429 (177 N. W. 602) and cases cited on p. 439.

Counsel for plaintiff base their claim of negligence of the engineer on the fact that he did not stop the train. There are several serious objections to the finding of the jury that this was negligence. The case is barren of any proof that it had been the custom of the deceased to ride on the engine with the knowledge of the engineer or fireman or any officer

of the company. There is no proof that trains had ever been stopped to receive him while going to or from his places of employment. There was a rule of the company as follows: "No one except the roadmasters, track foremen on train section, conductor or brakeman of the train will be allowed to ride on the engine without permission from the superintendent or master mechanic." The deceased had no permit whatever.

These facts clearly distinguish the case from some of the cases like *Kunza v. C. & N. W. R. Co.* 140 Wis. 440, 123 N. W. 403, where a regular custom had existed to allow the employee to ride upon the engine. In the absence of any proof that Wulz had previously been permitted to ride upon the engine and in the face of the positive rule of the company, the jury was not justified in deciding that it was the duty of the engineer to stop the engine for that purpose. *Spencer v. C., M. & St. P. R. Co.* 161 Wis. 474, 154 N. W. 979.

It is clear from the testimony that the engineer desired to accommodate one of the employees of the company and expected Wulz to board the engine. The train was moving hardly faster than a man could walk, and if deceased had not been incumbered by his tools no assistance would have been necessary. In view of the situation the engineer directed the fireman to assist Wulz in getting on, but evidently neither the fireman nor the engineer expected that deceased would suddenly pass into the zone of danger where he might be struck by a south-bound train on another track. In this connection it is an important fact that Wulz was not killed by the freight train while attempting to board it. He was struck by the passenger train while attempting to place his tools upon the pilot of the freight train.

The real issue on the question of defendant's negligence seems to be, not whether the train should have been stopped to enable Wulz to board it, nor whether insufficient assistance was given for that purpose, but whether the train

should have been stopped to permit Wulz to use the pilot as he tried to use it. Even if there had been a duty to stop the train to enable Wulz to board it, by reason of a former practice or custom, it could not be seriously claimed that there was any duty to stop it for so unusual and unexpected a use as was attempted.

The argument is made by plaintiff's counsel that it was negligence not to stop the train because the engineer realized that there might be injury to Wulz if he made a wrong move and entered on or approached too near the track of the passenger train. It is not contended that an engineer must stop his slowly moving train merely because he sees an employee walking toward him on the same track. It would be laying down a new and very rigid rule that a train must be stopped at depot grounds under such circumstances, or that it is a question for a jury to decide. In respondent's brief we are referred to *Scheuer v. Manitowoc & N. T. Co.* 164 Wis. 333, 159 N. W. 901, where the motorman of an electric car saw that the driver of a team beyond his control was near the zone of danger, and might have stopped the car in time to avoid the collision. Plaintiff also relies on the case of *Kalashian v. Hines,* 171 Wis. 429, 177 N. W. 602, where the plaintiff, with his head turned away, approached the track at a diagonal, which, if continued, was bound to bring him within the zone of danger, and where the jury found that no warning was given. In these cases it was held that there was a jury question, but they do not seem to us to be controlling. The engineer did everything possible without stopping the train to warn Wulz of any possible danger. He had no reason to expect that deceased would suddenly turn in the wrong direction, in close proximity to the track of the passenger train, or that he would attempt to use the pilot of the moving engine as a place for depositing his tools.

The burden rested on the plaintiff to prove not only that defendant was negligent, but also that such negligence was

the proximate cause of the death. This is under the familiar maxim that the law regards the proximate, not the remote, cause. Doubtless the immediate cause of the death was that Wulz stepped in front of, or stumbled against, the passenger train. Notwithstanding this, there might be such a combination of circumstances that this intervening cause would not prevent liability if the negligence of the engineer of the freight train were established. The celebrated case where a squib was thrown down in a market place and caused injury, and many others, might be cited as illustrations of the principle that where one event, according to human experience, is likely to be followed by another event, the person whose wrongful act caused the former event is responsible for the consequences which may flow from the latter. The rule is based upon the fact that the wrong-doer, using reasonable diligence, should have foreseen the result. Under such circumstances the original act still continues the direct and proximate cause and not one which is improbable and remote.

"The question always is, Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked as to make a natural whole; or was there some new and independent cause intervening between the wrong and the injury?" 1 Thompson, Comm. on Neg. (2d ed.) p. 55, § 52; *Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S. 469, 474; *Lynn G. & E. Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 33 N. E. 690.

In this connection it has been often held that it is not necessary to create liability that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been a natural and probable consequence. *Huber v. La Crosse City R. Co.* 92 Wis. 636, 66 N. W. 708; *Hill v. Winsor,* 118 Mass. 251; *Schumaker v. St. P. & D. R. Co.* 46 Minn. 39, 48 N. W. 559.

Applying these familiar rules to the instant case, do we find that the alleged negligence of the engineer in failing to stop the train was the efficient and proximate cause of the injury? It seems clear to us that in the use of reasonable diligence and care he was not bound to anticipate that the deceased would undertake the very unusual and extraordinary act of placing his tools upon the pilot of the moving engine.. His movements in passing from a place of safety into proximity to the other track, in attempting to use the engine pilot as a place for depositing his tools, in being so overbalanced as to step or fall upon the other track, were all unforeseen by and beyond the control of defendant or any of its employees.

These movements of the deceased were the intervening and independent causes without which the accident would not have happened and for which defendant was not responsible.

Defendant's counsel urge that there was such an assumption of risk as precluded a recovery. Assumption of risk is a defense under the federal act. But since we hold that the judgment should be reversed on other grounds, it is not necessary to decide this question.

By the Court.—Judgment of the circuit court is reversed, and the cause is remanded with direction to dismiss the complaint on the merits.

STATE EX REL. WISCONSIN DRY MILK COMPANY and others, Petitioners, vs. CIRCUIT COURT FOR DODGE COUNTY and another, Defendants.

January 10—February 7, 1922.

Corporations: Venue of action against foreign corporation: Accounting: Liquidation: Principal place of business: Visitorial powers over foreign corporations: Sufficiency of demand to change venue: Statutes: Construction: "Or" and "and."

1. Sub. 6, sec. 2619, Stats., placing the venue of actions against "any other corporation existing under the law of this state" in the county in which it is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose, includes foreign corporations.
2. Under said sub. 6 the proper place of trial of an action against a foreign manufacturing corporation is the county where it has its principal office or in which the cause of action or some part thereof arose, although it has its factory or the greater part of its property in another county.
3. The words "or" and "and" in statutes are often used incorrectly; and where a strict reading renders the sense dubious, one may be read in place of the other, in deference to the meaning of the context.
4. An action to recover in behalf of a foreign corporation moneys converted by its officers, as well as moneys lost to the corporation by their fraudulent and negligent conduct, may be maintained.
5. Though the state courts will not assume to exercise visitorial powers over a foreign corporation, and, in the absence of statutes, proceedings to forfeit a corporate franchise must be brought in the country or state in which the corporation was created, creditors and stockholders are not without remedy in the state for the fraudulent conduct of its directors and officers.
6. In an equitable action to recover in behalf of a foreign corporation moneys converted by its officers as well as moneys lost to the corporation by their fraudulent and negligent conduct, it is *held* that neither the cause of action nor any part thereof arose within the county where the action was brought, though numerous acts occurred in such county incidental to and leading up to the cause of action and quite necessary to its maintenance, and the action should be removed to the county where the corporation had its principal place of business.

7. Where defendant was entitled to remove the cause for trial only to the county designated in his demand, it cannot be said that the motion papers were insufficient because they failed to demand that the trial be had within the "proper county," as required by statute.

THIS IS A *mandamus* proceeding brought to compel the circuit judge of the Thirteenth circuit to change the place of trial from Dodge county to Milwaukee county of an action brought by Fred W. Rogers against the *Wisconsin Dry Milk Company,* a Delaware corporation, and certain of its officers and directors.

The action was commenced on November 15, 1921, by service of a summons and complaint. Defendants moved for a change of the place of trial, which motion was denied. The facts are stated in the opinion.

For the relators there was a brief by *Lenicheck, Boesel & Wickhem* of Milwaukee, and oral argument by *Frank T. Boesel.*

For the defendants there was a brief by *Lueck, Clark & Lueck* of Beaver Dam, and oral argument by *M. L. Lueck.*

JONES, J. The complaint in the original action alleged that the defendant corporation was organized under the laws of Delaware, and that its property, adapted to the manufacture of milk powder from whole milk, is situated in Dodge county, Wisconsin; that the plaintiff is a stockholder in the corporation; that on December 31, 1920, there were not sufficient assets to pay the liabilities of the corporation; that property was inventoried at an excessive value; that since December 31, 1920, by reason of gross mismanagement, the corporation had been losing money, and its assets were being wasted and that there was danger of bankruptcy and loss to creditors and stockholders; and that under proper management substantial profits could be made; that since said date the corporation has been under the management of incompetent officials, causing heavy losses; that excessive salaries are being paid to incompetent

men; that it is necessary to have the co-operation of farmers in the vicinity of the plant, and that an organization antagonistic to defendant is being attempted by the officers of the company, whereby the corporation is being undermined; that the individual defendants are or have been officers or directors of the corporation; that they carried out a plan for acquiring stock without paying therefor by reporting a much greater purchase price for land and other property than was in fact paid, whereby large sums were converted to the use of the individual defendants; that an extensive selling campaign was organized by the individual defendants and a large number of canvassers were employed to obtain purchasers of stock of the corporation, who operated extensively in Dodge county, and made false representations as to the value of the stock whereby not less than $200,000 was wrongfully diverted from the corporation and converted to the use of the individual defendants; and that the plaintiff, among others, was so defrauded.

The complaint prays that the affairs of the corporation be wound up and its assets distributed; that a receiver be appointed to carry on the business, and finally to sell the assets, pay the debts, and distribute the surplus among the stockholders; that the individual defendants be required to account for their fraudulent transactions; for an injunction, and such other relief as may be just.

The above is a mere outline of the elaborate complaint, but is deemed sufficient to present the questions raised.

There is very great diversity in state statutes relating to the place of trial of actions against foreign corporations. We find statutes permitting them to be sued wherever a state agent resides; wherever the cause of action arose or an agent is located; only where the principal office and place of business are located; where their business is done or corporate franchises are exercised; any county where they do business by an agent; where they have a business office

or a resident representative on whom process may be served; where they have property, or debts due; or where one of the parties resides.

There is such lack of uniformity in these statutes that very little aid can be obtained from judicial decisions construing them. Although there may be quite a similarity between the statutes on the subject, the presence or omission of a clause or even a word may cause a court decision, however able, in construing one statute, to be of little value in construing the other. It would be a real service to the administration of justice if statutes could be adopted in the several states providing for uniformity in determining the mode of service of process on corporations, foreign and domestic, and the places of trial.

In this state, sec. 2619 regulates the place of trial of actions, and is followed by other sections relating to change of venue. The first subdivision deals with local actions; the second with actions against public officers, and penalties and forfeitures; the third with actions for divorce; the fourth with interurban railroads; and the fifth with insurance companies.

It is conceded by both petitioners and defendants that the question before us is to be settled by a construction of one of the following sections:

"*Against other corporations.* Sixth. Of an action against any other corporation existing under the law of this state, the county in which it is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose.

"*Other actions.* Seventh. Of any other action, the county in which any defendant resides at the commencement of the action; or if neither defendant resides within this state, any county which the plaintiff designates in his complaint."

Subdivisions eight, nine, and ten relate to actions brought by the state, against the state, and actions on official bonds.

It is argued by counsel for petitioners that the only subdivision of the section applicable to the situation in this case

is the seventh; that this is the only one that contemplates the contingency of there being several defendants in an action whose residences may be in different counties of the state. Then it is argued that since this subdivision governs, the residence of the corporation fixed the place of trial, and numerous authorities are cited to the proposition that the residence of a foreign corporation is where the principal office is located.

Subdivision seven does not specifically include corporations, foreign or domestic. It evidently relates to a large class of transitory actions not enumerated in the other subdivisions.

Counsel for petitioners argue that subdivision six cannot include foreign corporations because they are not "existing under the law of this state." Of course a foreign corporation is created and exists in the state where it received its charter. But can it be said that it exists nowhere else? The first definition of the word "exist" in the Century Dictionary is, "to have actual being of any kind." It is not an uncommon practice for corporations to be incorporated under the laws of some state which are deemed favorable and to conduct substantially their entire business in some other distant state. The corporation could not have legally carried on business in Wisconsin until it complied with our statute regulating the admission of foreign corporations to do business in this state. After such compliance, it became a corporation existing under the law of this state. In the various subdivisions of the statute there is no mention of foreign corporations unless they are included in the words, "of an action against any other corporation existing under the law of this state." It is our view that this language includes domestic corporations not otherwise designated in this statute and foreign corporations as well.

It is argued by counsel for defendants in this proceeding that since the manufacturing plant of the corporation is located and operated in Dodge county, that is the county in

which the corporation is situated, and the proper place for trial, notwithstanding the principal office or place of business is in Milwaukee.

In actions against railroads the statute provides that a proper place of trial is the county in which plaintiff resides, if the road extends into such county, or the county in which the cause of action arose, and if the road does not extend into either such county the action may be commenced in any county into which the road does extend. The legislature might have enacted that actions against corporations in general might be tried in any county in which the same has property, or, indeed, in any county of the state, but this has not been the legislative policy. Many corporations in this state, foreign and domestic, have property and branch offices in many parts of the state. We do not think it has been the understanding of the profession that such facts made the location of the office or the property the proper place of trial for transitory actions.

A rule that actions against corporations are triable in any county where they may have property would lead to much uncertainty and confusion. It is true that in this case the plant is operated and most of the tangible property is located in Dodge county, but the rule should be general in its application and not affected by the amount of property in the respective counties.

There is force in the argument that, in order to give full effect to the words "the county in which it is situated," it should be held that Dodge county was a proper place for trial. This clause is followed by the words, "or has its principal office or place of business." Counsel for defendants in this proceeding have cited *Spratley v. L. & A. R. Co.* 77 Ark. 412, 95 S. W. 776, where it was held, construing quite similar language, that for the purpose of service under the statute a corporation is situated where it has its principal office or place of business; that the qualifying term "principal" precluded the idea of there being more than one

office or place of business where the corporation might be served, and that a different construction would change the meaning of the word. But on rehearing it was held that this construction of the statute was not correct, and that the situation of the corporation and its principal office might be in different places and that suit might be maintained in either county.

A majority of this court are of the opinion that the former decision of the Arkansas court was correct, and the proper place of trial of the present action is the county where the corporation has its principal office or the county in which the cause of action or some part thereof arose.

It is a familiar rule of construction that the words "or" and "and" are often used incorrectly, and that where a strict reading would render the sense dubious one may be read in place of the other, in deference to the meaning of the context. *Menominee River B. Co. v. Augustus Spies L. & C. Co.* 147 Wis. 559, 132 N. W. 1118; *State ex rel. Rich v. Steiner,* 160 Wis. 175, 151 N. W. 256; 2 Lewis' Sutherland on Stat. Constr. § 397.

It is our conclusion that the words "the county in which it is situated or has its principal office or place of business" means the principal office of the corporation. It is there that the books and records of the corporation are supposed to be kept and there its principal officers are supposed to attend to the affairs of the company. In the absence of statutory regulation it is obviously the proper place for service to be made and actions against the company to be tried.

In this connection it is proper to refer to sub. 10, sec. 1770*b*, Stats., which, in part, is as follows:

"*Powers and rights limited to those of domestic corporations.* . . . All foreign corporations and the officers and agents thereof doing business in this state, shall be subjected to all the liabilities and restrictions that are, or may be imposed upon corporations of like character, organized

under the laws of this state, and shall have no other or greater powers."

This section does not specifically mention the service of process and the place of trial, but supports the view that foreign corporations should have no better right to changes of venue than domestic corporations.

This brings us to the question whether the cause of action or any part thereof arose in Dodge county where the manufacturing plant is located. This is in the nature of an equitable action to recover in behalf of the corporation moneys converted by its officers, as well as moneys lost to the corporation by their fraudulent and negligent conduct. That such an action may be maintained against the officers of a foreign corporation was decided in *Ganzer v. Rosenfeld,* 153 Wis. 442, 141 N. W. 121. In the opinion in that case it was said by Mr. Chief Justice WINSLOW:

"It is doubtless true that the courts of a state will not assume to dissolve or regulate the internal affairs of a foreign corporation,—in other words, they will not exercise visitorial powers over such a corporation; but they may and will, in a proper case, require an accounting and restoration of property and money misappropriated or wasted by unfaithful officers who are within their jurisdiction."

It is true that the courts of a state will not assume to exercise visitorial powers over a foreign corporation, and, in the absence of statutes, proceedings to forfeit a corporate franchise must be brought in the country or state in which the corporation was created. 12 Ruling Case Law, "Foreign Corporations," § 85. But creditors and stockholders are not without remedy for the fraudulent conduct of directors and officers.

"Where all necessary parties are within the jurisdiction, relief may be afforded to stockholders or creditors against fraud or illegality, even though to some extent it may involve interference with the internal management of a foreign corporation. Illegal, fraudulent, or *ultra vires* acts

have been restrained, although necessarily this involves an interference with the internal management. A foreign corporation may maintain an action against former officers and directors who are resident within the jurisdiction to secure redress for negligent and fraudulent acts of defendants while officers of the corporation. Where a stockholder may sue on behalf of the corporation to redress a wrong done to it by its officers, directors, or agents, in accordance with the established rules governing representative stockholders' suits, such suits may be brought by stockholders of foreign corporations against resident defendants without violating the rule against interference with the internal affairs of foreign corporations." 14A Corp. Jur. 1330, 1331, citing many cases.

The question whether any part of the cause of action in this cause of action arose in Dodge county is not free from difficulty. It is alleged that fraudulent representations were made in Dodge county by canvassers procuring subscriptions to a large amount of stock whereby large sums were diverted from the corporation. It is not stated that all of the subscriptions were obtained in that county, nor where they were paid. No relief is demanded that the sales of stock be set aside. So far as appears the purchasers still own the stock, and a claim is made that a large amount was wrongfully diverted from the treasury of the company and converted to the use of the individual defendants. The gravamen of the complaint is that the directors and officers had fraudulently laid their plans to enrich themselves at the expense of the company, and by many acts of fraud, as well as by mismanagement and neglect, had succeeded in their plans. It must be assumed in the absence of allegations to the contrary that the wrongful acts were planned at the principal place of business of the company in Milwaukee. There would be no difficulty in coming to the conclusion that the main, primary cause of action arose at that place. The more difficult question is whether "some part thereof" arose elsewhere. The language of the statute was construed in *Bruil v. Northwestern M. R. Asso.* 72 Wis.

430, 39 N. W. 529, where it was held that a proper place of trial of an action against a life insurance company was the county in which the insured resided and in which his death occurred. In the opinion Mr. Chief Justice COLE said:

"It seems to us clear that no cause of action arose on this contract until the death of the assured in Iowa county and notice thereof to the defendant. The words 'cause of action,' as here used, would seem to be synonymous with right of action, and include the act or omission without which there would be no cause of action or right of recovery. 'A cause of action is said to accrue to any person when that person first comes to a right to bring an action.' "

In *Hosley v. Wisconsin O. F. M. L. Ins. Co.* 86 Wis. 463, 57 N. W. 48, the principal office of the life insurance company was in Milwaukee. In the opinion by Mr. Justice WINSLOW, holding that La Crosse county was a proper place for trial, it was said:

"Of course, the making of the contract, the payment of the premiums, the death of the assured, and the furnishing of the proofs of death, are all essential and vital facts without which there would be no cause of action; but even with all of these facts no cause of action would be complete until ninety days had passed after the receipt of proofs without payment. It was the default in payment within the ninety days which made the cause of action perfect. Prior to this default an action would have been premature. This default took place in La Crosse county, because by the contract and by-laws of the company the check was to be delivered to the beneficiaries, and, as they were continuously residents of La Crosse, that delivery was to take place in La Crosse county."

In *State ex rel. Northwestern Mut. L. Ins. Co. v. Circuit Court,* 165 Wis. 387, 162 N. W. 436, it was held that no part of the cause of action on a life insurance policy arose in Waushara county. This was the residence of the assured until his death in Chicago. The notice and proofs of death were drawn in Waushara county and mailed there, and in that county the administrator of the estate of the

assured was appointed. It was held that no part of the cause of action arose in Waushara county and that the proper place of trial was in Milwaukee county.

It will be seen that there may be numerous facts incidental to and leading up to a cause of action and quite necessary to its maintenance which are not a part of it within the meaning of the statute. In the case before us there was a long chain of facts on which the plaintiff relied as showing the misconduct of the directors, and on which he relied in asking for the appointment of a receiver. It would serve no useful purpose for us to attempt to lay down any general rule which should govern in all cases where the construction of this clause of the statute might come in question. The difficulty of such an undertaking is well illustrated in a very interesting and elaborate opinion by Mr. Chief Justice WINSLOW where the meaning of the terms "subject of the action" and "transaction" was discussed. *McArthur v. Moffet,* 143 Wis. 564, 128 N. W. 445. We must be content to pass upon the problem here presented and leave each case to be determined when necessary.

We are not disposed to hold that the fact that the property of the corporation was located in Dodge county or that subscriptions for stock were taken there authorizes us to decide that a part of the cause of action arose within that county within the meaning of the statute. To so hold might afford a precedent that, in suits by stockholders to wind up corporations and distribute the assets, and for the appointment of receivers, any misconduct of an agent in any county of the state would suffice to make that county the place of trial for such an action.

Defendants' counsel make the claim that the demand for change of venue was not sufficient, relying on *Anderson v. Arpin H. L. Co.* 131 Wis. 34, 110 N. W. 788, where the moving party failed to demand in the motion papers that the trial be had within the "proper county" as required by the statute. In a later case this court said:

"In the *Anderson Case* there were two counties to either

of which the defendant was entitled by statute to remove the cause for trial. The instant case is of such a nature that the statute gives the defendant the right to remove it to only one county, namely, Winnebago county, named in the demand. Under the facts in the instant case, Winnebago county is by statute the proper county, and it would be quite a technicality to hold that the movant must ratify the statute by again declaring in his demand what the statute has already declared. The demand must be held sufficient." *State ex rel. Bessie v. Halsey,* 148 Wis. 171, 172, 134 N. W. 362.

In the present case there was only one county to which the petitioners were entitled to have a removal, and the demand designated Milwaukee county as the proper place of trial and sufficiently described the location of the principal office and place of business of the corporation.

By the Court.—It is adjudged that the peremptory writ of *mandamus* issue as prayed in the petition, no costs to be taxed.

HERSCHMAN, Administrator, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

January 11—February 7, 1922.

Railroads: Employees' passes: Refusal of conductor to honor: Remedies of employee: Attempt to continue journey: Death of employee: Evidence.

1. An employee of a railroad company having an employee's pass which on its face entitled him to passage on a certain train, but who was refused passage by the conductor on the ground that a bulletin issued later than the pass prohibited the carrying of passengers on employees' passes on such train, had no right to attempt to ride thereon, but should have obeyed the orders of the trainmen and got off, even if he was caused considerable inconvenience.
2. In an action against the railroad company for the death of the employee, run over by the train after he had jumped on the rear steps of a sleeping-car under the trap door of the vestibule when he was refused passage, testimony that the

conductor had pushed deceased off the rapidly moving train is *held* incredible and contrary to reasonable probabilities and to the physical facts, in view of other circumstances in evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Reversed.*

Action for personal injury brought by the plaintiff against the defendant to recover damages for the death of Vasile Surdican on the 4th day of April, 1915, a short distance south of Corliss station in Racine county.

The deceased, an employee of the defendant, together with one Russo, left Milwaukee on the 3d of April, 1915, to attend Easter services in a church of their denomination at Indiana Harbor, and on the evening of the 4th, upon arriving at the Union passenger station at Chicago on their return trip toward Milwaukee, boarded the Pioneer Limited train of the defendant company, which train was known as No. 1, leaving said station at 6:45 p. m. At the time Surdican had an employee's pass, which specified that it was not good on certain lines, trains, or on parlor cars, but train No. 1 was not excepted. It was claimed by the conductor of train No. 1 that shortly before the happening of the accident an official bulletin was posted by the company prohibiting the carrying of passengers on train No. 1 riding on employees' passes.

Shortly after the train left the station at Chicago, Conductor Hare, while collecting fares, notified Surdican that his pass was not good on that train and that he would be obliged to leave the train at the next stop. Up to this point there is little dispute in the testimony of the witnesses. Defendant claims that the first stop of the train was at Western avenue, an important junction of railroads, and that upon arriving at such station the brakeman, pursuant to a request of the conductor, ordered Surdican and Russo to leave the train, and that both, in obedience to such order, did leave, and that the train thereupon proceeded on its course northward toward Milwaukee.

The conductor testified that the first stop of the train was at Western avenue, which testimony was also corroborated by the fireman, Wallace; two porters, namely, Hunter and Locke, the brakeman, Streeter, and the engineer, Klumb. Brakeman Streeter testified that both Surdican and Russo alighted at the depot platform at Western avenue. On the other hand, Russo testified that the train did not stop at Western avenue, but that it stopped after the train had left the Chicago station about fifteen minutes, at a point which he described as looking like a wilderness.

The brakeman, Streeter, testified that after the train left Western avenue and had arrived at a station called Healey, he observed Surdican standing on the hand-rails or stirrups of two sleepers attached to each other, which hand-rails or stirrups were located a short distance below the platforms of the two cars. Observing that Surdican was in a dangerous position, Streeter claims he cautioned him not to get off and motioned to him to remain where he was, and that he thereupon pulled the whistle signal for the engineer to stop, and that the train stopped at Mayfair, a closed station, and that he then directed Surdican to board the train, and that he left him on the rear seat of the coach. None of the defendant's witnesses testified that they saw Russo again after leaving the train at Western avenue station. In addition to Brakeman Streeter, the conductor, the engineer, the fireman, and the two porters testified that the second stop of the train was at Mayfair. Such testimony of the employees of the company is opposed by that of Russo alone, who testified that the only time he or Surdican was removed from the train was when the train stopped in some lonely unsettled portion in the country along the right of way. Streeter further testified that when the train arrived at Corliss he again ordered Surdican off of the train, and that Surdican complied with such order and left the train; that at Corliss he passed along the east side of the train for the purpose of ascertaining whether or not there were any hot boxes, and that in doing so he would have discovered

any one riding on the east side of the train, standing on the stirrups between the two cars, next to the vestibule diaphragm, and that he did not see Russo standing next to the vestibule diaphragm between the two sleepers, in accordance with Russo's contention as hereafter detailed.

Russo testified that after he and Surdican had been put off in an uninhabited and dark spot along the right of way, Surdican, when the train started, crawled onto the rear steps of a vestibuled sleeper, under the trap door in the vestibule, and remained in that position until the time of the happening of the injury which resulted in his death. He also claimed that while Surdican occupied this position on the steps, he took a position upon the stirrups or hand-rails next to the vestibule diaphragm, resting one foot upon the stirrup attached to the platform of the car on which Surdican was riding and the other foot upon the stirrup attached to the platform of the next car to the rear, and that the two stirrups were between thirty and twenty-four inches apart.

After the train had left Corliss the conductor claimed that in passing from one car to another he saw a hat appearing above the window in the vestibule door, and that he thereupon proceeded to open up the trap door but that he saw no one, but heard a sound as though some object had fallen onto the gravel next to the train; that he then closed the trap, and upon arriving at Milwaukee telegraphed to the section foreman to patrol the track; and that Surdican was found with his skull crushed, and dead, lying alongside of the track.

Russo testified that after the train had passed Corliss a short distance, the conductor, in passing from car to car, saw him through the vestibule window, and that he thereupon opened the trap door over the steps on which Surdican was riding; that Surdican immediately rose to his feet on the second step from the bottom; that the conductor immediately grabbed hold of Surdican's chest and struck him a number of violent blows with his ticket puncher in the

face and upon the head; and that in the meantime he, Russo, passed from the position which he was then occupying, and while the train was going at the rate of between forty and fifty miles an hour, onto the lowest step leading to the platform, and that the conductor immediately gave him a violent push, as the result whereof he was thrown from the train.

As to the liability of the defendant, the case was submitted to the jury upon one question of the special verdict, in which the jury found that the conductor, while the train was in motion, north of Corliss, used such direct personal violence upon the body of Surdican as to cause the latter to fall from the train.

At the close of the testimony defendant's counsel made a motion for a direction of a verdict in defendant's favor, which motion was denied. Defendant's counsel also moved to change the answer of the jury to the above question from "Yes" to "No," and for judgment in defendant's favor notwithstanding the verdict, and for a new trial, all of which motions were denied, and judgment was entered in plaintiff's favor as above indicated. The refusal of the court to grant the motions above referred to, and the entry of judgment as stated, constitute defendant's assignments of error.

For the appellant there were briefs by *H. J. Killilea* and *Rodger M. Trump*, both of Milwaukee, and oral argument by *Mr. Killilea.*

For the respondent there was a brief by *Houghton, Neelen & Houghton* of Milwaukee, and oral argument by *Albert B. Houghton.*

DOERFLER, J. We have set out in the statement of facts the testimony in the case at some considerable detail, for the reason that the case presents almost exclusively a question of fact. Did the conductor, after the train passed Corliss, apply such force upon Surdican as to cause him to be thrown from the train, as the result of which he came to

his death? The conflict in the evidence on material points involved is so great that we are led to the inevitable conclusion that either the statements of Russo are false or that the testimony of the defendant's witnesses is false. They cannot both be the truth.

Ordinarily, apparently conflicting statements of witnesses may be properly reconciled, and wherever a possibility exists to reconcile such testimony it is the duty of the court to do so. The evidence in this case is beyond reconciliation. True, Surdican and Russo were not vagrants or vagabonds, but apparently hard-working and law-abiding members of the community, excepting only with respect to the matters and facts shown in the evidence in this case. Surdican was an employee of the defendant company, and, from the reading of his employee's pass, was entitled to passage upon train No. 1. However, there can be no controversy upon the fact that when Surdican was denied the right to travel upon this train it was his duty to abide by the orders of the trainmen, and to seek redress, if any he had, otherwise than by endeavoring unlawfully to become a blind passenger upon this train. It is unquestionably true that the action of the trainmen in refusing Surdican a passage on this train and in putting him off of the train resulted in great inconvenience to him. It is significant, to say the least, that the overwhelming testimony in the case sustains the evidence of the company's trainmen that this train stopped first at Western avenue station, and second at Mayfair, and that both Surdican and Russo were put off the train at Western avenue, and that Surdican was taken from his position of peril at Mayfair and invited to, and that he did, occupy a seat in the coach until the train arrived at Corliss.

In determining where the truth lies in this case we must take into consideration the testimony as a whole, including that which pertains to what transpired at the time of the happening of the injury as well as that which referred to occurrences prior thereto. It is true that the conductor, when he claims he discovered someone standing outside of

the vestibule door, may have had some feeling of resentment, in view of his previous experience with the deceased and Russo. However, these experiences, as is generally known, are not uncommon to trainmen on passenger trains. The conductor was an old and trusted employee of the company, having had seventeen years of experience as a passenger conductor, and having acted for five years as the conductor on the Pioneer Limited, one of the principal through trains on defendant's road between Chicago and Minneapolis. It must be admitted that as to what occurred at and immediately prior to the death of Surdican the testimony of Russo is opposed solely by the testimony of the conductor. If the testimony of Russo be true, then the conductor was guilty of murder in the first degree in applying violence upon Surdican while he was standing upon the steps of the platform in a perilous position while the train was moving at the rate of between forty and fifty miles an hour. If he wilfully pushed Russo from the train, as was testified to by the latter, he was guilty of an assault with intent either to do great bodily harm or to commit murder. If Russo was violently thrust from the train while it was going at the rate aforesaid, it is almost inconceivable that he should not have shared a fate similar to that of Surdican.

The actual facts as detailed in the evidence, taken in connection with the surrounding facts and circumstances and the undisputed evidence as to the speed of the train, together with the overwhelming impeachment of Russo's testimony as to what transpired before the accident happened, are so persuasive as to force us to the inevitable conclusion that Russo's testimony is incredible and against all reasonable probabilities.

In *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 360, 77 N. W. 714, in an opinion of the court by Mr. Chief Justice CASSODAY, it is said:

"The only portion of the plaintiff's testimony upon which the verdict could stand is not only made incredible by all the evidence in the case, but is intrinsically improbable. . . .

In such cases the trial court, which is vested with a very broad discretion—far more so than this court,—should promptly set aside the verdict. *Badger v. Janesville Cotton Mills,* 95 Wis. 599, 70 N. W. 687; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 491, 72 N. W. 1124. Of course, this court has frequently sustained verdicts supported only by a single witness, whose testimony was in conflict with a number of other witnesses, but a verdict must be supported by credible evidence as to facts not intrinsically improbable."

In *Peat v. C., M. & St. P. R. Co.* 128 Wis. 86, 90, 107 N. W. 355, it is said by the court, Mr. Justice DODGE rendering the opinion:

"The meaning of the expression 'against all reasonable probabilities,' as rendering testimony incredible, was further explained in *Bourda v. Jones,* 110 Wis. 52, 60, 85 N. W. 671, 674, as follows: 'A sworn statement which is obviously false in the light of reason and common sense and facts within common knowledge is not to be received in court as true because some witness wilfully or ignorantly or recklessly so testifies.' And again, in *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57: 'Testimony may be so in conflict with conceded and established physical facts as to be incredible for the reason that its truth is morally impossible or so improbable in the course of nature as to approximate impossibility.' When, however, any fact essential to a verdict is supported only by evidence thus rendered incredible, the setting aside such verdict is no longer discretionary with the trial court, but a duty, failure of which is error reviewable on appeal. *Flaherty v. Harrison,* 98 Wis. 559, 562, 74 N. W. 360; *Cawley v. La Crosse C. R. Co.* 101 Wis. 145, 150, 77 N. W. 179; *O'Brien v. C., St. P., M. & O. R. Co.* 102 Wis. 628, 78 N. W. 1084; *Musbach v. Wis. C. Co.* 108 Wis. 57, 68, 84 N. W. 36; *Bourda v. Jones,* 110 Wis. 52, 60, 85 N. W. 671, 674; *Ellis v. C., M. & St. P. R. Co.* 120 Wis. 645, 98 N. W. 942."

We therefore hold that Russo's testimony is incredible, contrary to all reasonable probabilities, and contrary to the

physical facts. The judgment of the circuit court is therefore reversed, with directions to enter judgment in favor of the defendant dismissing plaintiff's complaint, with costs.

By the Court.—Judgment reversed.

ROSENBERRY and OWEN, JJ., dissent.

BALLARD and others, Appellants, vs. ARCHAMBAULT, Respondent.

January 11—February 7, 1922.

Brokers: Non-exclusive contract of employment: Right of owner to sell.

1. One who has given brokers a non-exclusive right to lease or sell land on commission may himself lease or sell to one who, in good faith and without actual or constructive notice to the contrary, he believes has not been procured by such brokers, without being liable to them for commissions.
2. Where a contemplated lease of land for baseball purposes to persons procured by brokers having a non-exclusive right to procure the lease was not consummated for lack of financial ability of the proposed lessees, and the owner, being assured that the land was not wanted for baseball purposes, in good faith having given an option for a lease to another not known to have any connection with the persons procured by the brokers and who he thought wanted the land for manufacturing purposes, he was not liable for commissions upon the execution of a lease to the assignee of the person holding the option, notwithstanding information from the brokers, after the execution of the option and before the execution of the lease, as to a connection between the assignee and such persons and as to the prospective use of the land for baseball purposes.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Action to recover $6,000 agents' commission claimed to be due on the leasing of defendant's real estate located in Chicago. One Albert A. Wilbur, a member of plaintiffs'

firm, attempted to secure a lessee for defendant. He interested several individual parties, including Racey, Powers, and Gilmore, who intended to form a baseball league under the name of the Federal league, in the property, and negotiations went so far as to secure from defendant an option for a week or ten days expiring July 5, 1913, on the property for a lease of ninety-nine years on certain specified terms, including the payment of $6,000 commission to plaintiffs if the deal went through.

The option expired without any deal having been made and plaintiffs so notified defendant. The reason the deal fell through was a lack of financial ability on the part of Racey, Powers, and Gilmore. Several months thereafter defendant was approached by one Anderson, acting for one Ainsworth of the real-estate firm of Willoughby & Company, who claimed to have a purchaser or lessee for defendant's land for light manufacturing purposes, and on November 25, 1913, the defendant notified plaintiffs of the offer. On November 29, 1913, the defendant, after being assured that the land was not wanted for baseball purposes, gave a thirty-day written option to Ainsworth or his assignee for a ninety-nine-year lease, upon terms less favorable to himself than the one given to Racey, Powers, and Gilmore. The deal was consummated in accordance with the option. The jury found that the plaintiffs were the procuring cause of the securing of the latter option which was assigned by Ainsworth to Weeghman and Walker, who were interested in the Federal baseball league. The court set aside such finding and entered judgment for defendant dismissing the action upon the merits, with costs. From such judgment plaintiffs appealed.

For the appellants there was a brief by *Bottum, Hudnall, Lecher & McNamara* of Milwaukee, attorneys, and *Herbert E. Bradley* of Chicago, of counsel, and oral argument by *Frank L. McNamara* and *Geo. B. Hudnall.*

For the respondent there was a brief by *Bloodgood, Kem-*

per & Bloodgood of Milwaukee, attorneys, and *Adler & Lederer* of Chicago, of counsel, and oral argument by *Jackson B. Kemper.*

VINJE, J. The case presents questions of fact only, and the trial court correctly disposed of it because there was practically no conflict in the evidence upon the basic facts that control. It is therefore deemed unnecessary to detail considerable evidence in the case that was argued both orally and in the briefs. Defendant did not give the right to an exclusive sale or lease to the plaintiffs. He had the right to sell or lease to any one in good faith unknown to him to have been procured by plaintiffs. *Roberts v. Harrington,* 168 Wis. 217, 169 N. W. 603, and note to same in 10 A. L. R. 814. It is conceded by plaintiffs that at the time he entered into the option contract with Ainsworth he did not know that the Federal baseball league or any prospective clients of plaintiffs were interested therein. He in good faith believed that the property was wanted for light manufacturing purposes and insisted that the spur track thereon should not be removed; and this provision was incorporated into the option and contract. It is also admitted by plaintiffs that defendant would have suffered heavy damage had he breached his option contract with Ainsworth. With these facts clear and undisputed it is immaterial what information he had from plaintiffs after he had given the option to Ainsworth. That option bound him to carry it out or suffer heavy damages. Having entered into that option without notice, actual or constructive, that Ainsworth was either directly or indirectly connected with or acting for any prospective purchaser or lessee of the plaintiffs, the rights of the parties became fixed. The defendant at the time of entering into the last option contract had no reason to believe that he had to pay a commission to plaintiffs in case it was carried out, and he no doubt fixed his terms of lease accordingly. But whether he did or

not, plaintiffs had no right to a commission and could gain none later against his protest. Under these circumstances it becomes immaterial to trace the connection, if any, between Ainsworth's clients, Weeghman and Walker, and Racey, Powers, and Gilmore, the clients of plaintiffs. The principle of law that governs this case is that the owner of property who has given an agent a non-exclusive right to sell it on commission may himself sell to one who he in good faith and without notice, actual or constructive, to the contrary, believes has not been procured by the agent, without rendering himself liable to the agent for the commission.

By the Court.—Judgment affirmed.

JOHN, Respondent, vs. PIERCE, Appellant.

January 11—February 7, 1922.

Automobiles: Negligence of driver as imputed to invited guest: Former appeal: Law of the case: New trial: Discretion of court.

1. An order granting a new trial without stating the grounds therefor will not be disturbed unless the court abused its discretion, the presumption being, since the court imposed costs as a condition, that the order was granted because of errors by the jury or because the verdict was contrary to the weight of the evidence, costs not being imposed if a verdict is set aside for errors of the court.
2. Where opposite conclusions may reasonably be drawn from the evidence, the granting of a new trial on the ground that the verdict was against the weight of the evidence is not an abuse of discretion.
3. On a former appeal in this case it was held that the negligence of the driver of an automobile in which plaintiff was riding as an invited guest defeated his right to a recovery, but since that decision this rule of law has been changed (*Reiter v. Grober*, 173 Wis. 493); the legal principles laid down in the first appeal, whether right or wrong, become, however, the law of the case on all future trials or appeals.
4. Although this court on the former appeal decided that the negligence of the driver of the car in which plaintiff was

riding was a defense, but that he was not guilty of contributory negligence as a matter of law, the trial judge, taking a different view of the merits of the action on retrial, did not abuse his discretion in setting aside a verdict for the defendant and granting a new trial on the ground that the verdict was against the weight of the evidence, and his action will not be disturbed, the evidence being such that conflicting conclusions might be reached by different persons.

APPEAL from an order of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

This is an action brought by plaintiff to recover damages for personal injuries sustained by him as the result of an automobile collision which occurred on one of the highways in Waukesha county on the 18th day of August, 1918. Plaintiff was riding as an invited guest in the automobile of one William B. Johnson, who was at the time driving the car. The Johnson car was proceeding in a westerly direction, and at a curve in the highway they met defendant's car, which was being driven by his daughter. Defendant's car was on the north or left-hand side of the road and, according to the testimony on behalf of the plaintiff, was approaching at a speed of thirty miles an hour. The testimony on behalf of the plaintiff is to the effect that when Johnson discovered the approaching *Pierce* car it was then within a distance of seventy-five feet. Johnson, perceiving that the *Pierce* car was on the north side of the road, and fearing that he could not avoid a collision by keeping his car to the right, suddenly turned it to the left. The *Pierce* car was turned to the right and a collision occurred on the south side of the highway. This case was here upon a former appeal (172 Wis. 44, 178 N. W. 297) from a judgment in plaintiff's favor, the same having been rendered upon a special verdict of the jury which found the driver of the defendant's car guilty of negligence and absolved Johnson, plaintiff's host, from contributory negligence in turning to the left. The judgment was reversed upon that appeal and remanded for a new trial. Upon the second trial

the jury returned a special verdict by which it was found that the driver of the defendant's car was not negligent and that Johnson, the driver of the car in which plaintiff was riding, was negligent.

The plaintiff moved to set aside the verdict on numerous grounds. The trial court set aside the verdict and granted a new trial upon condition that plaintiff pay the costs. From such order granting a new trial the defendant brings this appeal.

For the appellant there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *James D. Shaw.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter D. Corrigan.*

OWEN, J. No reason was given by the trial court for setting aside the verdict and granting a new trial. In view of the fact that the order was made on condition that plaintiff pay the costs, the presumption is that it was granted by reason of errors committed by the jury, or because the verdict was considered contrary to the weight of the evidence, and in our consideration of the case we shall so assume. Costs could not have been imposed if the verdict had been set aside for errors of the court. *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664. The order, therefore, was a discretionary one, and will not be disturbed by this court unless there appears to have been an abuse of discretion on the part of the trial court. The rule which governs this court in determining whether there was such an abuse of discretion, as stated in *Kittner v. M. & N. R. Co.* 77 Wis. 1, 45 N. W. 815, is that where opposite conclusions may reasonably be drawn from the evidence by different persons, the granting of a new trial on usual terms, upon the ground that the verdict was against the weight of evidence, is not an abuse of discretion.

So far as the negligence of the defendant is concerned, it is plain that different persons may reasonably draw opposite conclusions with reference thereto, and this is evidenced by the fact that the first jury found the driver of the defendant's car negligent, while the second jury exonerated her from negligence. That such is the state of the evidence concerning the defendant's negligence is not challenged by either party.

A much closer question is presented, however, when we come to consider the negligence of Johnson, the driver of the car in which plaintiff was riding. The evidence on that question was substantially the same on both trials. Upon the first appeal this court indicated its dissatisfaction with the verdict of the jury which exonerated Johnson from negligence, but refrained from holding that the evidence showed him to have been negligent as a matter of law, and remanded the case for a new trial. Appellant upon this appeal contends that it was held on the former appeal that Johnson was negligent as a matter of law. However, such is not the case. The judgment was reversed because of errors of the court in instructions refused and in instructions given to the jury. This implies that Johnson could not be held negligent as a matter of law upon the record then before us. On the other hand, it is now contended by the respondent that the negligence of Johnson is no defense to the action, as by the decision of this court rendered in *Reiter v. Grober,* 173 Wis. 493, 181 N. W. 739, the principle of law formerly prevailing in this state, that the negligence of the driver of a vehicle is imputed to the passenger, was overruled, and that as such negligence is not now imputed to the passenger it should be held in this case that the negligence of Johnson is no longer a material consideration. While this court will apply the rule announced in *Reiter v. Grober, supra,* to cases hereafter coming before it (*Chase v. American C. Co., post,* p. 235, 186 N. W. 598), it cannot be applied to this case for the reason that upon the former

appeal it was specifically declared that the negligence of Johnson constituted a defense to the action. While the question was not there discussed as a novel proposition, it was declared to be the well settled law of this state, and the case was disposed of upon the theory that Johnson's negligence defeated plaintiff's right to a recovery. In the absence of such an assumption this court would not have reversed the former judgment, but would have remanded the case with instructions to render judgment in favor of the plaintiff, as no error was found inducing the affirmative finding of the jury upon the question of defendant's negligence. Whenever legal propositions are laid down upon an appeal they become the law of the case upon all future trials or appeals, whether right or wrong. *Jeffery v. Osborne,* 145 Wis. 351, 129 N. W. 931. Upon the former appeal it was decided in effect that Johnson's negligence constituted a defense to the action, and that Johnson was not guilty of contributory negligence as a matter of law. From this it necessarily follows that the evidence bearing upon Johnson's negligence is susceptible to opposite conclusions by different persons, and that under the rule which governs us we cannot say that the trial judge abused his discretion in setting aside the verdict and granting a new trial. And this is true even though, as is apparent, the trial court takes a different view of the merits of the case than that entertained by this court. There was no attempt in the former opinion to conceal the view entertained by this court concerning the weight of evidence so far as it related to Johnson's negligence. That opinion is still entertained. But the rules of judicial procedure do not permit us to dispose of the case in accordance with such views. Under our system the jury is the final arbiter of disputed questions of fact. A discretion is vested in the trial court to grant a new trial when he feels that the verdict is against the weight of evidence,

and this court will not disturb his action in that respect where the evidence is such that conflicting conclusions may be reached by different persons.

By the Court.—The order appealed from is affirmed.

ROSENBERRY, J., dissents.

LEE, Appellant, vs. BIELEFELD and wife, Respondents.

January 11—February 7, 1922.

Fraud: Misrepresentations as to boundaries of land: Liability of vendor: Measure of damages: Improvements made on land of another: Removal.

1. When a vendor undertakes to point out to a purchaser a lot he is selling he is bound to do so correctly; and when the purchaser is ignorant of its location he has the right to rely on the positive statement of the vendor and to hold him responsible whether the false representation was intended or not.
2. The liability of the vendor does not depend on his negligence or intent, the injury to the vendee being the same whether the false representation is made in good faith or recklessly with intent to defraud; and in this case it is *held* that under the circumstances the vendee was not negligent in failing to have a survey of the lot made.
3. The usual measure of damages in cases of false representation as to the identity of land sold is the difference between the value of the land pointed out and that of the land conveyed; but such rule does not apply as against a vendor who pointed out a lot which he did not own and upon which the plaintiff vendee, assuming that he had purchased it, constructed improvements, which he was not permitted to remove; and the vendee was entitled to such damages as were the natural and proximate result of the misrepresentations of the vendor.
4. A barn and foundation for a house constructed upon the lot of another by mistake could not be removed without the consent of the owner of such lot.

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and this court will not disturb his action in that respect where the evidence is such that conflicting conclusions may be reached by different persons.

By the Court.—The order appealed from is affirmed.

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2. The liability of the vendor does not depend on his negligence or intent, the injury to the vendee being the same whether the false representation is made in good faith or recklessly with intent to defraud; and in this case it is *held* that under the circumstances the vendee was not negligent in failing to have a survey of the lot made.
3. The usual measure of damages in cases of false representation as to the identity of land sold is the difference between the value of the land pointed out and that of the land conveyed; but such rule does not apply as against a vendor who pointed out a lot which he did not own and upon which the plaintiff vendee, assuming that he had purchased it, constructed improvements, which he was not permitted to remove; and the vendee was entitled to such damages as were the natural and proximate result of the misrepresentations of the vendor.
4. A barn and foundation for a house constructed upon the lot of another by mistake could not be removed without the consent of the owner of such lot.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed.*

Action on false representations in the sale of a lot in Milwaukee county. The complaint alleged that defendants offered to sell plaintiff a certain lot; that they showed plaintiff and pointed out to him the boundaries of this lot; that thereafter a land contract was entered into which defendants represented as describing the lot previously pointed out; that plaintiff, relying on such representations, expended money and labor in building a house and barn upon such lot; and that by reason of the false representations and the fact that the lot so pointed out was the property of another, plaintiff lost the benefits of the money and labor so expended and suffered loss in the sum of $2,500.

Defendants admitted the sale of a lot, but denied that the boundaries of any lot were pointed out, and alleged that plaintiff took possession of the lot described in the contract.

It appears that defendant *Charles Bielefeld* owned lot No. 16 in a certain addition, and that he executed a land contract properly describing this lot; and that plaintiff built a barn and the foundation for a house on lot 17, the adjoining property. The contract was executed in October, 1916. Plaintiff began building late in 1917, and after the completion of the barn and the foundation for a house was notified by defendant to stop work as he was on the wrong lot. Plaintiff began this suit in October, 1918. In January, 1920, the owner of lot 17 notified plaintiff that the structures should not be removed or disturbed.

Plaintiff introduced testimony tending to show that defendant *Charles Bielefeld* personally pointed out the lot built on; that there was a "For Sale" sign bearing defendant's name on this lot; and that the labor and materials expended were of the value of $1,100.

Defendant and his witnesses testified that the structures were not firmly fixed to the ground and could be moved easily, and that they did not exceed in value $400.

In a special verdict the jury found, in substance, that defendant *Charles Bielefeld* represented to plaintiff that lot 17 was the one to be sold; that defendant did not know that such representation was false; that plaintiff relied on such representations and was induced thereby to expend money and labor on lot 17; and that the damage sustained was $720.

Defendant moved for judgment notwithstanding the verdict. The motion was granted with costs against the plaintiff.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* attorneys, and *M. K. Whyte,* of counsel, all of Milwaukee, and oral argument by *Walter D. Corrigan.*

John Sander of Milwaukee, for the respondents.

JONES, J. It has long been the settled law in this state that when a vendor undertakes to point out or state to a purchaser the boundaries or situation of the property he is selling, he is bound to do so correctly; and when the purchaser is ignorant of the location, he has the right to rely on the positive statement of the vendor and to hold him responsible whether the false representation was intended or not. *Bird v. Kleiner,* 41 Wis. 134; *Cotzhausen v. Simon,* 47 Wis. 103, 1 N. W. 473; *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88; *Castenholz v. Heller,* 82 Wis. 30, 51 N. W. 432; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Knudson v. George,* 157 Wis. 520, 147 N. W. 1003.

In the present case the special verdict was agreed to by both parties. Defendants made no request for a finding whether the representation was recklessly made or whether the plaintiff by the exercise of ordinary care could have ascertained the true location of the lot conveyed. These were issues which the trial court deemed necessary to be decided, and under sec. 2858*m,* Stats., resolved them both in defendants' favor. The cases already cited show that the court was in error in failing to observe the rule that liability for an untrue representation of this character

does not depend on the negligence or intent of the vendor. The injury to the buyer is the same whether the false representation is made in good faith or whether it is made recklessly or with intent to defraud.

As to the other issue on which the court made his special finding, we consider that the decision was not warranted by the evidence. The lots were vacant land similar in appearance, without fences or other boundary marks. On the lot pointed out to the plaintiff was the "For Sale" sign. It was settled by the finding of the jury that the untrue statement as to boundaries did not consist of a mistake as to a few inches or a few feet, but that the wrong lot was pointed out.

In the decision the trial court expressed the belief that plaintiff should have caused a survey to be made and that his failure to obtain it was negligence which should defeat a recovery. In *Castenholz v. Heller,* 82 Wis. 30, 51 N. W. 432, the buyer was furnished an abstract of title containing a plat of the land sold him. If he had carefully compared the plat with the description given him he would have discovered the mistake. Although the plaintiff in that case testified that he did not observe the size or boundary of the lot on the plat, the jury found that he had used ordinary care, and this court held that the finding was warranted by the facts. In the instant case the plaintiff had no source of information except the statements of the defendant and he had the right to rely on them.

In our opinion the view of the court that, under the circumstances, plaintiff should have procured a survey, is neither required by the authorities nor consonant with common usage.

The trial judge expressed the view that the damages found by the jury were excessive. In cases of false representations as to the identity of the land sold, the usual measure of damages is the difference between the value of the land pointed out and that of the land conveyed. Obviously

such a rule would afford no compensation in this case because there was practically no difference in the value of the two lots. The natural inference is that when plaintiff bought the small lot he intended to erect improvements upon it. He did so before discovering the mistake.

He had no right to remove the structures except with the consent of the real owner of the lot.

"The mere fact that the fence in question was built by the plaintiff upon lands not his own, by mistake, did not prevent its becoming a fixture to the real estate as soon as it became attached to the soil." *Kimball v. Adams,* 52 Wis. 554, 556, 9 N. W. 170; *Huebschmann v. McHenry,* 29 Wis. 655.

No such consent was ever given until under the stress of the trial, and then was given grudgingly and with conditions plaintiff was not bound to accept.

It is only just that defendant should be charged with such damages as are the natural and proximate result of his misrepresentations. 39 Cyc. 1639; 27 Ruling Case Law, "Vendor and Purchaser," p. 386; *Lawson v. Vernon,* 38 Wash. 422, 80 Pac. 559.

When the defendant learned of the mistake which he had made he manifested no concern, and cannot now complain if he is required to make compensation for plaintiff's loss. The jury found that loss to be $720, and there was testimony on which a greater sum could have been awarded. It is our conclusion that the plaintiff is entitled to judgment and that the finding of the trial court should be set aside.

By the Court.—Judgment reversed, and cause remanded with direction that judgment be entered for the plaintiff on the verdict.

McCAFFERY, Appellant, vs. AUTOMOBILE LIABILITY COMPANY, LIMITED MUTUAL, and another, Respondents.

January 11—February 7, 1922.

Automobiles: Common carriers: Jitneys: Degree of care required toward passengers: Negligence: Right to assume others will observe law of road.

1. The operator of a jitney bus having complied with secs. 1797—62 to 1797—68, Stats., was a common carrier and was required to exercise toward passengers the highest degree of care reasonably to be expected from human vigilance and foresight in view of the character of the conveyance and consistent with the practical operation of the business, but he was not charged with the necessity of either possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency.
2. The driver of an automobile had a right to assume that the driver of another car along an intersecting street over which he had a right of way would comply with the rules of the road as provided by the statutes and yield to him the right of way.
3. Where a jitney bus driver proceeded to cross a street intersection in front of an automobile approaching from the left and over which he had the right of way, and, on discovering that such automobile had turned and was dangerously approaching, turned in the same direction as such automobile and could have avoided a collision if the automobile had not swerved and struck the rear wheel of the jitney, its driver did not fail to exercise the high degree of care which he owed his passenger and was free from negligence as a matter of law.

APPEAL from a judgment of the circuit court for Milwaukee county: W. B. QUINLAN, Judge. *Affirmed.*

Action for personal injury.

The defendant *Schissler,* at the time of the happening of the injury, was the owner and operator of a Ford jitney in the city of Milwaukee, having complied with the provisions of secs. 1797—62 to 1797—68 of the Statutes, and the *Automobile Liability Company, Limited Mutual,* was the carrier insurer.

Lloyd and Twelfth streets are two public streets in the city of Milwaukee and intersect each other at right angles, Lloyd street running east and west and Twelfth street running north and south. There are two street-car tracks on Twelfth street. While the defendant *Schissler* was operating his car, in which the plaintiff was a passenger, north on the east side of Twelfth street so that the wheels of his car were straddling the east rail of the east car track, and when he arrived at or about the south crosswalk of Lloyd street, an automobile approached from the west the west crosswalk of Twelfth street, and simultaneously a truck being driven south on the west side of Twelfth street arrived at or about the north crosswalk of Lloyd street. *Schissler's* car at the time was going somewhat in excess of fifteen miles per hour, and after having passed the crosswalk with his rear wheels *Schissler* looked towards the east to observe the traffic from that direction, and seeing no vehicle approaching immediately looked towards the west and there observed the automobile coming from that direction. In order to avoid any possible collision he swerved his car first towards the east and then continued a short distance towards the north, and thereafter, realizing that the car coming from the west was dangerously approaching, he put on additional speed and drove his car towards the northeast corner of the intersection of the two streets named, and after having passed in part the intersection, the automobile coming from the west, after having barely escaped a collision with the truck, swerved towards the northeast and collided with the rear wheels of *Schissler's* car at the northeast corner of the intersection, causing *Schissler's* car to be upset, as the result of which collision the plaintiff sustained the injuries complained of.

The action was originally tried in the civil court of Milwaukee county before a jury, and a special verdict was rendered in which it was found (1) that *Schissler* failed to exercise ordinary care in the management and operation

of his car at and just previous to the collision; (2) that such failure was the proximate cause of plaintiff's injury. Thereupon the usual motions were made by the defendants, which motions were denied, and judgment was thereupon entered in favor of the plaintiff for the amount of the damages assessed, and costs, from which judgment the defendants appealed to the circuit court for Milwaukee county. The circuit court reversed the judgment of the civil court and ordered judgment in favor of the defendants dismissing the complaint, from which judgment this appeal was taken to this court.

For the appellant there was a brief by *Cannon, Waldron & Schweichler* of Milwaukee, attorneys, and *M. L. Lueck* of Beaver Dam, of counsel, and oral argument by *Mr. Lueck.*

J. Elmer Lehr of Milwaukee, for the respondents.

DOERFLER, J. *Schissler* being a common carrier, and the plaintiff being a passenger in his car, the law applicable in cases of that kind with respect to common carriers, as laid down by this court, governs the degree of care which he was required to exercise. It has been held that "The duty imposed on common carriers to provide for the safety of passengers is to exercise the highest degree of care reasonably to be expected from human vigilance and foresight in view of the character of the conveyance adopted and consistent with the practical operation of the business." *Dibbert v. Metropolitan Inv. Co.* 158 Wis. 69, 73, 147 N. W. 3; *Oberndorfer v. Pabst,* 100 Wis. 505, 513, 76 N. W. 338; *Ferguson v. Truax,* 132 Wis. 478, 490, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513; *Wanzer v. Chippewa Valley E. R. Co.* 108 Wis. 319, 84 N. W. 423.

In law, under the situation presented in this case, *Schissler's* car had the right of way over the automobile coming from the west, and the latter had the right of way over the truck coming from the north. As *Schissler's* car approached and proceeded to cross the south crossing of

Lloyd street, he had the right to assume that the automobile coming from the west would comply with the rules of the road as provided for by the statute and yield to him the right of way. *Zimmermann v. Mednikoff*, 165 Wis. 333, 162 N. W. 349; *Glatz v. Kroeger Bros. Co.* 168 Wis. 635, 170 N. W. 934.

In violation of the rules of the road with respect to the rights of the defendant *Schissler,* the automobile coming from the west at an excessive rate of speed proceeded to pass in front of the truck coming from the north, and the defendant *Schissler,* realizing the emergency, took what he considered the proper course to avoid a collision by first swerving his machine towards the east, then proceeding towards the north, and then towards the northeast, and he had arrived with his machine at about the northeast corner of the intersection of the two streets named when the automobile coming from the west struck the rear left wheel of his car, causing the same to be upset, and resulting in the injuries aforesaid.

It is true, as is claimed by plaintiff's counsel, that it was held by this court in *Glatz v. Kroeger Bros. Co.* 168 Wis. 635, 170 N. W. 934, Mr. Chief Justice WINSLOW rendering the opinion, that

"The possession of this right [of way] does not of course justify the possessor in plunging ahead regardless of consequences nor in failure to exercise ordinary care to avoid injury to others, but the fact is an important one to be considered in deciding the question of negligence."

In determining in this case whether or not the defendant *Schissler* was free from negligence as a matter of law, we must place ourselves as nearly as possible in the situation he was in, under the circumstances as detailed in the evidence. Having the right of way, and being justified in assuming that such right would be yielded to him, he proceeded on his northerly course after crossing the south crosswalk of Lloyd street, then, as an extra precaution, he first

swerved his machine towards the east, intending thereby to avoid any possibility of a collision, and thereupon, realizing that the automobile coming from the west was suddenly turned toward the northeast corner of the intersection, directly towards *Schissler's* car, he turned his machine in a northeasterly direction, so that it was headed for the northeast corner of the intersection, all of which was done not only in an effort to protect the plaintiff as a passenger, but to avoid injury to himself and his car. Surely, after *Schissler* had passed the south crossing of Lloyd street, he had no reason to expect that the automobile coming from the west would suddenly turn into and collide with his machine after he had arrived at said northeast corner.

While the operator of a jitney, under the law pertaining to common carriers, is obligated to exercise the high degree of care above referred to, he is not charged with the necessity of either possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency. The degree of care required by the doctrine laid down in the case of *Dibbert v. Metropolitan Inv. Co.* 158 Wis. 69, 73, 147 N. W. 3, must be such as is consistent with the practical operation of the jitney business.

The contention is also made that the defendant, in crossing the intersection, was driving at an illegal and excessive rate of speed. It is our view that the speed in this instance had a tendency rather to avert the injury than to cause it.

We are convinced that the claim made by plaintiff's counsel herein, that *Schissler* should have either stopped his car before crossing the intersection or have turned his car to the east onto Lloyd street, under the evidence in this case, would be charging him with the exercise of such degree of care as would be inconsistent with the practical operation of his business, and we therefore hold that the defendant *Schissler* was free from negligence which proximately contributed to the injury, as a matter of law.

By the Court.—Judgment affirmed.

CHASE, Special Administrator, Appellant, vs. AMERICAN CARTAGE COMPANY, INC., Respondent.

January 11—February 7, 1922.

Courts: Decision of court of last resort: Obiter: Judicial dictum: Decision of germane questions: Law of the case: Appeal: Change in judicial rule: Effect on pending cases: Automobiles: Imputed negligence.

1. The binding force of a decision is co-extensive with the facts upon which it is founded; but when a court of last resort takes up a co-related subject matter stating that it intends to decide it, and does so, such decision is not mere *obiter dictum,* but is at least a judicial *dictum.*
2. Where this court was asked to extend a rule of law laid down in a previous decision of the court, the court's statement that it would not only not extend the rule, but would not thereafter recognize it as a valid or just rule, is not mere *obiter dictum.*
3. Where there are two grounds upon either of which the judgment of the trial court can be rested and the appellate court sustains both, neither is *obiter,* but each is the judgment of the court and of equal validity with the other.
4. When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum,* but is a judicial act of the court which it will thereafter recognize as a binding decision.
5. The judgment of the trial court, though in accord with the rule of imputed negligence as previously stated by this court, did not establish the law of the case so as to preclude this court on appeal from deciding the case in accordance with a contradictory rule of law adopted subsequent to the rendition of the judgment.
6. A lawful change in a judicial rule, not amounting to a rule of property or its equivalent, by a court of last resort, becomes effective at once, and thereafter upon subsequent appeals operates alike upon acts coming within it whether occurring before or after its announcement.
7. In an action for the death of an automobile passenger in which the trial court set aside a verdict for plaintiff and rendered judgment for defendant on the theory that the negligence of the driver should be imputed to the passenger, this court, in reversing the judgment, will not remand the case for a new trial as against the defendant's contention that

questions as to the passenger's contributory negligence and as to whether her death was proximately caused by the accident were not as fully tried as they should have been, but will direct the lower court to enter judgment for the amount of the verdict, since such question should have been fully litigated at the time of trial.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed.*

Action for damages resulting from death caused by an automobile collision which occurred March 8, 1920. The jury found defendant negligent; that its negligence was the proximate cause of the death of the deceased; damages in the sum of $3,390, and also that the driver of the deceased was guilty of negligence proximately contributing to produce her death. Upon such special verdict the trial court on December 20, 1920, entered judgment for the defendant dismissing the action upon the merits, with costs. The plaintiff appealed.

For the appellant there were briefs by *Cannon, Bancroft & Waldron* of Milwaukee, attorneys, and *M. L. Lueck* of Beaver Dam, of counsel, and oral argument by *Mr. Lueck.*

Dale C. Shockley, attorney, and *Edgar P. Ettenheim,* of counsel, both of Milwaukee, for the respondent.

VINJE, J. The only question presented by the appeal is whether the rule that the negligence of a driver would not be imputed to a mere gratuitous passenger stated in *Reiter v. Grober,* 173 Wis. 493, 181 N. W. 739 (decided March 8, 1921), should be applied. Counsel for defendant claim it should not be because the announcement of the change of rule made in *Reiter v. Grober* was *obiter dictum* and cannot be relied upon as a binding decision; that the judgment when entered by the circuit court was correct; that it became the law of the case, and that it would be unjust to change it now. They have subdivided their argu-

ment into many more propositions, but the above statement we think fairly presents their substantial claims.

It is true that it was not necessary in order to decide the issue in *Reiter v. Grober* to go as far as to reverse the case of *Prideaux v. Mineral Point,* 43 Wis. 513, and it was so stated. While it is a rule of general application that the binding force of a decision is co-extensive with the facts upon which it is founded, it is nevertheless also true that when a court of last resort takes up a co-related subject matter stating that it intends to decide it, and does so, such decision is not a mere *obiter dictum.* It is at least a judicial *dictum. Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264, 19 N. W. 56. In *Reiter v. Grober* we were asked to apply the rule of *Prideaux v. Mineral Point* and to extend it to include the situation then presented. The court therefore had up for consideration the validity of the rule in *Prideaux v. Mineral Point* as well as its extension, for when a rule of law is applied the court must assume its validity even if it does not expressly state it. So when we were asked to take the rule in *Prideaux v. Mineral Point* and extend it, we were asked to recognize or continue the rule and extend it to the situation before us. In answer we said, we will not only not extend the rule but we will not hereafter recognize it as a valid or just rule. True, we could have said we will not extend it, and that would have decided *Reiter v. Grober.* But having the rule before us as we did for recognition and extension, we deemed it an opportune time to say that we would neither recognize nor extend the rule.

That a subject matter so considered is more than a mere *obiter dictum,* see cases cited in *Hall v. Madison,* 128 Wis. 132, 145, 107 N. W. 31. That they appear in a dissenting opinion does not militate against their worth upon the point now under consideration. The federal supreme court states the rule thus:

"Where there are two grounds upon either of which the judgment of the trial court can be rested, and the appellate

court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other." *Union Pac. R. Co. v. Mason City & Ft. D. R. Co.* 199 U. S. 160, 166, 26 Sup. Ct. 19.

In *Reiter v. Grober* the case could have been disposed of as it was either by overruling the doctrine as to imputed negligence or by refusing to extend it. We said we not only refused to extend the doctrine but that we expressly overruled it. We decided it on two grounds, either of which effectively affirmed the judgment below. A further statement in the federal case above cited is here applicable to the effect that "Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called a mere *dictum.*" Id. 166. See, also, *Florida Cent. R. Co. v. Schuette,* 103 U. S. 118. Thus it frequently happens that a negligence case, for instance, may have to be reversed because the trial court erred in refusing to submit the question of contributory negligence to the jury. All that is absolutely necessary to fully dispose of the appeal is to so decide. But there may also be presented questions of pleadings, of evidence, of instructions to the jury, of whether defendant was guilty of gross negligence, etc. These the court will consider and decide for the future guidance of the trial court in that case upon a retrial, and for trial courts generally. It has never been considered that the points so decided are *obiter dicta* because not essential to a decision of the case in which they are decided. It is deemed the doctrine of the cases is that when a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.

In the present case this question is not so vital because the court has heretofore in another case than that of *Reiter*

v. Grober overruled the doctrine of *Prideaux v. Mineral Point* in so far as the present question is concerned. This was done in *Brubaker v. Iowa Co.* 174 Wis. 574, 183 N. W. 690, in which it was held that the contributory negligence of the husband was not imputable to his wife who rode with him when she was injured because of a defective highway.

Does the fact that when an appealable judgment is entered by a trial court it is in accord with the then law make it the law of the case? If it does, then this court cannot apply to it the rule of law it has twice announced within a year. As stated in *Reiter v. Grober,* the rule of imputed negligence was not a rule of property in which any one had a vested right, but was a pure rule of judicial construction in negligence cases, and that no one could say he relied upon it, because such reliance would stamp him a wrong-doer—convict him of wilful negligence. It was therefore held that the court could change the rule, and such change became applicable to all future cases coming before it unless the law of the case had been otherwise declared by this court as in *John v. Pierce, ante,* p. 220, 186 N. W. 600. The judgment of a trial court that is appealed from cannot establish the law of the case. That must be established by this court in the decision upon the appeal. A lawful change in a judicial rule not amounting to a rule of property or its equivalent, by a court of last resort, becomes effective at once, and thereafter, upon subsequent appeals, operates alike upon acts coming within it whether occurring before or after its announcement. *Kneeland v. Milwaukee,* 15 Wis. 454; *Mason v. A. E. Nelson C. Co.* 148 N. C. 492, 62 S. E. 625, 18 L. R. A. N. S. 1221 and note; 7 Ruling Case Law, 1010; 26 Am. & Eng. Ency. of Law, 179.

Defendant asks that in the event the judgment is not affirmed a new trial be granted because it is claimed the questions of the contributory negligence of the deceased and whether her death was proximately caused by the accident were not as fully tried as they should have been. The

contributory negligence of the deceased, if established, would have been a complete bar to the cause of action. Presumably it was not litigated because none was conceived to exist. She was a mere passenger in the automobile driven by her host, Johanna Glaeser. The jury found that the death of the deceased was proximately due to the accident. If this had been disproven it would have been a bar to the bulk of the damages found and should have been fully litigated as well as plaintiff's contributory negligence. Cases cannot be tried piecemeal.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiff for $3,390 with interest and costs.

ZARCONE, Appellant, vs. PAYNE, Agent under Transportation Act of 1920, Respondent.

January 12—February 7, 1922.

Federal employers' liability: Negligence of fellow-servant: Assumption of risk: Knowledge of negligence of co-employee: Question for jury.

1. While the negligence of a fellow-servant does not constitute a defense under the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149), assumption of the risk does.
2. In accepting employment an employee may presume that his fellow-servants are competent and careful, and he does not assume the risk of their unexpected negligent acts.
3. An employee who continues at work without protest, with knowledge of the fact that he is exposed to extraordinary hazard by reason of a defective appliance or machine or by reason of the negligent manner in which a co-employee does his work, assumes the unusual risk created.
4. Whether the negligent practices of a fellow-servant have been of such frequent occurrence as to charge persons of reasonable care and prudence similarly situated with knowledge of the unusual risk arising to those who are working with him, is ordinarily for the jury.

5. Where the jury would have been warranted from plaintiff's testimony in finding that a co-employee engaged with him in replacing ties on defendant's railroad track had acted in a negligent manner so often that a person of ordinary care and prudence would have known that the disposition and practices of such co-employee constituted an unusual hazard of the work, the court should have submitted the question as to whether the plaintiff assumed the risk.

APPEAL from an order of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff, a section hand, to recover damages for personal injuries sustained while in the employ of the defendant railroad company during the time it was under federal control. Plaintiff, with others, was engaged in removing old ties from under the rails and replacing the same with new ties. He and one Paratulla worked together in the performance of this work. Picks were used to pull out the old ties. It was customary for both men, one standing behind the other, to sink their picks into a tie and then to pull concertedly on the picks. The man standing behind notified the other when he was ready so that they should pull in unison. In performing this work Paratulla always stood in front of plaintiff, and plaintiff would notify him when he was ready to pull. At the time when plaintiff sustained his injuries they were so working. Both had planted their picks in a tie. The plaintiff stood back of his pick with the end of the handle thereof pointing to the region of his groin. While plaintiff was spitting on his hands and getting ready to pull, he observed Paratulla preparing to pull and called to him to wait a minute. Paratulla, however, disregarded the warning and pulled on the handle of his pick, jerked the tie backwards, causing the end of plaintiff's pick handle to strike him in the groin on the left side, as a result of which a traumatic hernia was produced.

The case was tried in the civil court of Milwaukee county. A special verdict was returned by which it was found that

the plaintiff sustained a rupture; that the fellow-servant was guilty of negligence in moving the tie with his pick; that plaintiff's injury was caused in whole or in part by such negligence; that no negligence on the part of the plaintiff proximately contributed to his injury; and assessed damages in the sum of $1,500.

The defendant requested the court to submit as a part of the special verdict the question, "Did the plaintiff assume the risk of doing the work in the manner described by the plaintiff?" The court refused to include such question in the special verdict. The defendant appealed from the civil court to the circuit court, assigning as error the refusal of the civil court to include such question in the special verdict. The circuit court held that such question should have been included in the special verdict, and ordered a new trial in the circuit court, from which order plaintiff brings this appeal.

For the appellant there was a brief by *Cannon, Waldron & Schweichler* of Milwaukee, attorneys, and *M. L. Lueck* of Beaver Dam, of counsel, and oral argument by *Mr. Lueck.*

For the respondent there was a brief by *H. J. Killilea, Rodger M. Trump,* and *Thomas E. Torphy,* all of Milwaukee, and oral argument by *Mr. Trump* and *Mr. Torphy.*

OWEN, J. The sole question is whether the trial court erred in refusing to include in the special verdict a question requested by defendant relating to plaintiff's assumption of the unusual risk attending the work arising from the negligent conduct of Paratulla. This action is brought under the federal Employers' Liability Statute and, consequently, the negligence of a fellow-servant constitutes no defense to the action. However, it appears from plaintiff's testimony that Paratulla, upon several occasions prior to the accident, had pulled upon his pick before plaintiff was ready; that this incident had occurred upon sufficiently nu-

merous occasions to acquaint plaintiff with the negligent disposition of Paratulla in this respect, and respondent contends that, by continuing the employment after such knowledge, the plaintiff assumed the unusual risk arising from Paratulla's conduct in pulling upon the pick before plaintiff was ready. It is well settled that assumption of the risk does constitute a defense under the federal Employers' Liability Act.

In accepting employment an employee may presume that his fellow-servants are competent and careful, and he does not assume the risk of their unexpected negligent acts. 1 Shearman & Redf. Neg. (6th ed.) § 207*g*; *Graber v. D., S. S. & A. R. Co.* 159 Wis. 414, 150 N. W. 489; *Ewig v. C., M. & St. P. R. Co.* 167 Wis. 597, 167 N. W. 442, 169 N. W. 429. But it is well settled that an employee who continues at work without protest with knowledge of the fact that he is exposed to extraordinary hazard by reason of a defective appliance or machine, thereby assumes such unusual risk. By the same token, where an extraordinary hazard arises by reason of the negligent manner in which a co-employee does his work, and the employee with full knowledge of such negligent disposition on the part of his co-employee continues at work without protest, he assumes the unusual risk thus created. Of course there is a difference between a defective machine and a negligent co-employee in this: a defective appliance or machine will remain defective until repaired and the risk arising from its use will be constant. A co-employee may be negligent upon one occasion only and thereafter properly perform his task or duty. His negligent acts may be of frequent or infrequent occurrence. The mere fact that he is negligent upon one occasion does not necessarily imply that he will be negligent upon future occasions. But it is apparent that they may be of such frequent occurrence as to charge persons of reasonable care and prudence with knowledge that it is dangerous to work with him. Where such is the case,

and his co-employees, notwithstanding such knowledge, continue in the employment without protest, they assume the risk arising from his negligent practices as well as the risk arising from the continued use of a defective appliance or machine. Of course it is ordinarily for the jury to say whether his negligent practices have been of such frequent occurrence in the past as to charge men of reasonable care and prudence similarly situated with knowledge of the extraordinary or unusual risk or danger arising to those who are working with him. Where such is found to be the fact, then it follows as a matter of law that those who continue to work with him as his co-employees assume the extraordinary or unusual risk of the employment arising from his negligent tendencies.

In this case the jury would have been warranted in finding from plaintiff's testimony that upon numerous occasions in the past Paratulla had prematurely pulled upon his pick; that such occasions were so numerous as to charge a person of ordinary care and prudence similarly situated with the fact that Paratulla's disposition and practices in such respect constituted an unusual or extraordinary hazard of the work. Had the jury so found, they would have been warranted in answering the question requested by the defendant in the affirmative, which would have defeated plaintiff's right to a recovery. The trial court erred in its refusal to submit the question, and a new trial was properly granted by the circuit court.

By the Court.—Order affirmed.

GAUTHIER, Appellant, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Respondent.

January 12—February 7, 1922.

Federal employers' liability: Limitation of actions: Estoppel: Fraud.

1. The right to maintain an action under the federal Employers' Liability Act for personal injuries is conditional on bringing the suit within two years, as required by sec. 6 of the act, which is not merely a limitation of the remedy; and verbal promises and acts by the employer that might ordinarily constitute an estoppel do not estop the employer from pleading the limitation.
2. Allegations in a complaint that the defendant employer represented to plaintiff that it would settle for his injuries and that it would be unnecessary for him to sue, and that he relied thereon and neglected to sue in time and thereby lost his cause of action, are construed to relate to future events and not to existing facts, and are therefore insufficient to show actionable fraud.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

This is an appeal by plaintiff from an order sustaining defendant's demurrer to a complaint setting up two causes of action for an injury received by plaintiff while engaged in interstate commerce in defendant's baggage room at San Diego, California.

The alleged injury occurred March 2, 1916. This action was commenced November 5, 1920. Under the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149), the time within which an action of this nature may be brought is limited to two years. It appears that plaintiff filed a claim with the Industrial Accident Board of California, which claim was denied on October 31, 1916, because of want of jurisdiction, on the ground that plaintiff's remedy was solely under the act of Congress.

After setting out the circumstances relative to the injury, the complaint, in the first cause of action, alleged that de-

fendant, through its claim agent, represented and stated to plaintiff

"That the said defendant would pay to your plaintiff and settle with him for the injuries received, hereinbefore more particularly set forth, and that it would not be necessary to, and that your said plaintiff should not, commence any action under the said acts of Congress against said defendant, and that your plaintiff believed and relied upon such statements and representations of the said defendant, so made, and for that reason failed and neglected to commence, within two years from the time of receiving such injuries, an action under the said acts of Congress to recover such damages, and that the said defendant, by reason of the statements and representations made to your plaintiff by its agents and servants, including the statements made by the said Miller, is estopped from pleading and should not now be heard to plead and claim that your plaintiff's said cause of action is barred or lost by reason of his failure to commence an action for the recovery of such damages, within two years from the time of receiving the same."

The complaint, in the second cause of action, set out the same material facts as above, and in addition alleged that defendant falsely and fraudulently represented and stated to plaintiff

"That the said defendant would pay to your plaintiff and settle with him for the injuries received, hereinbefore more particularly set forth, and that it would not be necessary to, and that your said plaintiff should not, commence any action under the said acts of Congress against said defendant, and that your plaintiff believed and relied upon such false and fraudulent statements and representations of the said defendant, so made, and for that reason failed and neglected to commence, within two years from the time of receiving said injuries, an action under the said acts of Congress to recover such damages.

"And that your plaintiff, by reason of the said false and fraudulent statements and misrepresentations, and by reason of defendant's said deceit, upon which he relied, failed and neglected to commence within two years limited by the

acts of Congress, an action to recover his said damages, and that at the time said defendant, its agents and servants made such false and fraudulent statements and representations, your plaintiff had a good and valid cause of action under said acts of Congress, as he is informed and verily believes, of the value of no less than $25,000, and that by reason and in consequence of such false and fraudulent representations and deceit of defendant, your plaintiff has, as he is informed and believes, lost his cause of action, all to your plaintiff's damage in the sum of $25,000."

For the appellant there was a brief by *Cannon, Waldron & Schweichler* of Milwaukee, attorneys, and *M. L. Lueck* of Beaver Dam, of counsel, and oral argument by *Mr. Lueck.*

For the respondent there was a brief by *Henry V. Kane* of Milwaukee and *Homer W. Davis* of Chicago, attorneys, and *Gardiner Lathrop* of Chicago, of counsel, and oral argument by *Mr. Davis.*

First cause of action.

JONES, J. The first count in the complaint must be regarded as an action brought to recover for personal injury under the federal Employers' Liability Act. The complaint claims damages for personal injury under that act and alleges facts relied on to estop defendant from pleading the statute of limitations.

The section involved is as follows:

"Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." 8 Fed. Stats. Ann. (2d ed.) p. 1369.

This section is very brief and perfectly clear in its meaning. The act of Congress giving rights of action to employees gives to them new and important rights and imposes new liabilities upon railroad companies. It creates liabilities where none existed before and takes away defenses for-

merly available. Unlike ordinary statutes of limitation, this one is not merely a limitation of the remedy. The act under consideration creates the right and specifies the conditions under which it may be enforced, and a compliance with those conditions is essential. In cases brought under this statute the decisions of the federal courts must govern, and these uniformly hold that the lapse of time not only bars the remedy but also destroys the liability. *Central Vt. R. Co. v. White,* 238 U. S. 507, 35 Sup. Ct. 865; *Atlantic Coast Line R. R. v. Burnette,* 239 U. S. 199, 36 Sup. Ct. 75.

In *American R. Co. v. Coronas,* 230 Fed. 545, 546, it is said:

"The right granted exists only by virtue of the statute, and its scope and effect must be determined therefrom. The language of the act makes it plain that the right and correlative liability thereby established are conditional upon the bringing of the suit within two years from the day the cause of action accrued. The bringing of the action, therefore, within the specified time is a condition to the exercise of the right, and, if the condition is not complied with, the parties stand, with respect to the wrongful act, as though the statute had not been enacted. The limitation relates, not merely to the remedy, but to the right."

In another case Judge SANBORN writing the opinion said:

"A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. Such a statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability." *Partee v. St. L. & S. F. R. Co.* 123 C. C. A. 292, 204 Fed. 970.

In construing another statute, the same rule was stated by this court in *George v. C., M. & St. P. R. Co.* 51 Wis. 603, 8 N. W. 374.

The decisions of this court have been in harmony with the federal decisions above cited, and in cases where it has been claimed that ordinary statutes of limitation have been tolled by verbal promises or by conduct it has been held that they cannot be avoided by showing facts that might ordinarily constitute an estoppel *in pais*. *Williams v. J. L. Gates L. Co.* 146 Wis. 55, 60, 130 N. W. 880; *Boyd v. Mutual Fire Asso.* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171; *Pietsch v. Milbrath,* 123 Wis. 647, 101 N. W. 388, 102 N. W. 342; *Guile v. La Crosse G. & E. Co.* 145 Wis. 157, 130 N. W. 234.

Appellant's counsel cite *Guile v. La Crosse G. & E. Co., supra,* but that case declares that a person can be estopped in no other way than that prescribed by the statute, and adheres to the rule stated in the cases above cited. Appellant's counsel also rely on *O'Donnell v. State,* 126 Wis. 599, 106 N. W. 18, a criminal case, but it was there held that there was no estoppel, and we do not regard the decision as one departing from the rule long ago established in this court.

It seems clear that no error was committed by sustaining the demurrer to the first cause of action.

Second cause of action.

In this count the plaintiff claims recovery on the ground of fraud and deceit. It is claimed that his cause of action was lost by reason of the false representations of defendant. It is the theory of plaintiff's counsel that defendant deprived plaintiff of his cause of action by fraudulent representations and thereby furnished a new cause of action, and that the measure of damages would be the value of the claim as it existed when the fraud was practiced.

It might be urged with some force that to sustain causes of action under such circumstances as here appear would

lead to evasions of statutes of limitation by unscrupulous creditors or claimants and to some extent defeat the purpose of such statutes. Without discussing the subject, we are disposed to base our decision on the ground that no facts are stated in the complaint amounting to fraudulent representations. There was no fiduciary relation existing between plaintiff and defendant. No device or artifice which might induce plaintiff to postpone action is alleged. It is true that there are the allegations that defendant fraudulently represented and stated to plaintiff that it would pay and settle for the injuries received and that it would be unnecessary for plaintiff to bring suit, and that plaintiff relied on such statements and neglected to commence an action for two years under the act of Congress. Appellant's counsel urge that these representations related to existing facts, and rely on the case of *Brown v. Ocean A. & G. Corp.* 153 Wis. 196, 140 N. W. 1112. In that case, after the injury plaintiff was at a hospital under control of defendant's agents and its physicians, and it was alleged he was induced to sign a release of damages by their fraudulent representation that his injuries were not permanent. There were other allegations as to future facts and opinions and promises to pay all expenses, etc. It was held that since these representations were made by persons having special knowledge of the facts, and related in part to the extent of plaintiff's injuries, they should not be construed as mere matters of opinion or future promises.

The argument is made in the brief of appellant's counsel that when defendant's agent "falsely and fraudulently represented that a debt or obligation existed on defendant's part and that the same would be settled and paid without the necessity of plaintiff exercising his legal remedies, a fraud was committed for which redress will be granted."

There is no allegation that any false representation as to defendant's obligation was made, and if there were, such an allegation would be contrary to the other allegations of

the complaint and the whole theory on which the action was commenced. We feel compelled to construe the allegations as those relating to future events and not existing facts, and therefore not actionable. Mere promises to pay a debt in the future, although broken, are not fraudulent, although they may be so labeled in the complaint. It is axiomatic that, in drawing a complaint charging fraud, the pleader must state facts constituting the fraud alleged, so that the court may form its own opinion as to its sufficiency.

Plaintiff's counsel argue that the former strict rule has been so relaxed that false representations as to value and opinions may constitute fraud, citing *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790, and *Ohrmundt v. Spiegelhoff,* 175 Wis. 214, 184 N. W. 692. But an examination of these cases will show the peculiar circumstances under which statements of opinion as to value were held actionable and they fall far short of asserting that mere promises to perform acts in the future, although broken, may constitute fraud. Many decisions of this court declare the contrary rule. *Sheldon v. Davidson,* 85 Wis. 138, 55 N. W. 161; *Morrison v. Koch,* 32 Wis. 254; *Patterson v. Wright,* 64 Wis. 289, 25 N. W. 10; *James M. Co. v. Bridge,* 134 Wis. 510, 114 N. W. 1108; *Horton v. Lee,* 106 Wis. 439, 442, 82 N. W. 360; *Tufts v. Weinfeld,* 88 Wis. 647, 60 N. W. 992.

The trial judge did not err in sustaining the demurrer to the second cause of action.

By the Court.—The order appealed from is affirmed.

HANLEY, Appellant, vs. HINES, as Agent, Respondent.

January 12—February 7, 1922.

Compromise and settlement: Presumption: Burden of proof: Sufficiency of evidence.

1. Compromise settlements are greatly favored in the law, and when made, particularly when evidenced by writings signed by the claimant, cannot be impeached on the ground of fraud or mistake unless the evidence clearly, beyond reasonable controversy, establishes such mistake or fraud.
2. In personal injury actions wherein the defense of settlement is interposed, the burden of proving the settlement is on defendant; but when a proper release, duly executed and signed, is introduced, the settlement can only be overcome by evidence on behalf of the plaintiff which is clear and convincing beyond reasonable controversy.
3. Where plaintiff's testimony as to how an accident occurred was opposed to the weight of disinterested testimony and barely credible, and in so far as the legal liability of the defendant company was concerned she had a doubtful case, the evidence (set out in the opinion) is *held* not to overcome the presumption created by a release signed by her, which she could have read, and a check which she cashed containing a provision that it was in full payment of her loss of personal property and in satisfaction of her claim for personal injuries.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

The appeal is from an order of the circuit court reversing the judgment of the civil court of Milwaukee county and granting a new trial of said action in the circuit court.

Action for personal injuries. The plaintiff is a resident of the city of Milwaukee, twenty-four years of age, having been born, raised, and educated in such city, and at the time of the happening of the injuries complained of was employed by the Federal Rubber Company at Cudahy, Wisconsin, in a clerical position. She also had seven years of experience as a telephone operator with the Wisconsin Telephone Company and the Milwaukee Sentinel.

On the 28th day of February, 1920, at about 7:25 a.m., she left her home in order to take a 7:45 a. m. passenger train at Allis station for Cudahy. In order to reach the station she first took a street car to the corner of Reed street and National avenue in the city of Milwaukee, and then was obliged to walk a distance of about two and one-half blocks before reaching the station. At Allis station the tracks of the railroad company are elevated, and to reach the platform it is necessary to ascend steps leading thereto. On the morning in question the train was a few minutes late. When the street car on which she was riding reached the corner of Eleventh and National avenues she met one James A. Sullivan, who intended to take the same train, and he accompanied her when she walked from Reed street and National avenue to the station.

Sullivan testified that he told the plaintiff as they left the street car that they were late and that they would have to hurry, and both started to run for the train, and when they arrived at Allis station the evidence shows they were both well winded.

Plaintiff claimed that when she arrived on the railroad platform the train was standing still and that she boarded the third passenger coach from the front, and that as she was about to step on the third step of the coach the train jerked, causing her to be precipitated onto the platform, and as the result thereof she sustained the injuries complained of. All of the other witnesses in the case testified that at the time the plaintiff attempted to board the train it was moving, and the plaintiff stands alone in her contention that the train was standing still.

Frank Kline, the flagman on the train, Charles R. Pratt, the brakeman, Richard C. Bradley, a freight conductor of the railway company, and George J. New, the engineer on the train, testified that when the train started all the passengers had boarded the same. Bradley also testified that he saw the plaintiff at National avenue, before she ascended

the station platform, and that she was running at that time; that the train was moving when she arrived at the steps of the coach which she intended to board; that she started to run along with the train, and that she let the fourth coach pass by; that the train was going somewhat faster than the plaintiff was running, and that in attempting to grab the hand-rail alongside of the steps of the coach she was swung around and thrown down onto the platform.

William H. Horn, Thomas Sommers, and James A. Sullivan, all employees of the Newport Chemical Company at Carrolville, Wisconsin, arrived at Allis station at or about the time that the plaintiff arrived and saw the plaintiff running to catch the train, and testified that the train was moving at the time she attempted to board it.

One Carl L. Young, an assistant claim agent of the defendant company, whose office was on the fourth floor of the Railway Exchange Building, Milwaukee, testified that after the accident he visited the plaintiff at her home for the purpose of making a settlement with her, and that some time thereafter the plaintiff called upon him at his said office; that the plaintiff and witness discussed the matter of settlement; that witness made an offer to settle her claim for $210, which offer was accepted by the plaintiff; that thereafter he prepared and presented to the plaintiff a release in duplicate, under and pursuant to the terms whereof the plaintiff agreed to and did make a settlement of her claim with the railway company, which release provided, among other things, for a full discharge of the company from all claims and demands which she then had against the company by reason of the injury received by her, and for damages for loss of and injury to her clothing and other personal property. That when said release was handed to the plaintiff she read the same, and, at the request of the witness, wrote in her own handwriting, over her signature, the following, to wit: "I have read and understand this release." That thereupon the witness handed to the plaintiff a check of the company for

$210, which check, among other things, contained the following: "In full settlement of claim for injuries received and loss and damage to clothing." The witness also testified that he advised the plaintiff that she could take the check down to the office on the first floor of the building and have the same cashed, and that the plaintiff then left the office of the witness and proceeded to the railway company's office and cashed the check.

The plaintiff testified that she signed the release in duplicate and that she also wrote the portion above referred to, "I have read and understand this release;" that she received the check and took it to the office of the company and cashed it; that in fact she did not read the release or the check; that at the time one of the duplicate releases was presented to her for signature, Young placed his hand over the release so as to hide the contents thereof, but that when she signed the other duplicate release Young did not hide the contents of the release with his hand, and that she could have read it if she desired; that before she signed the release Young told her that she could not sue the United States government because the railroads were in the control of the government; that Young also said to her, before she signed the release, that if she did not trust him he could not trust her; that he was paying the sum of $210 in satisfaction of her claim for damage to her clothes, for her doctor bill, and for attendance, and that the claim for personal injuries would receive attention later on and would be taken care of.

The case was submitted to the jury on a special verdict, and the jury answered among other things: (1) that the plaintiff was injured on February 28, 1920, while boarding defendant's car; (2) that the car was suddenly jerked while the plaintiff was in the act of boarding it; (3) that the plaintiff did not attempt to board the car in question after it had started and while moving; (4) that the negligence of the company in starting the car with a jerk was the proximate cause of the injuries; (5) that the negligence of the

company was the proximate cause of plaintiff's injuries; (6) that the plaintiff was free from contributory negligence; (7) that the plaintiff did not execute and deliver to the defendant a release and satisfaction in writing for all personal injuries and damages to her clothing in full for the sum of $210; (8) that the plaintiff did not know before she cashed the check that it was in full settlement of her claim against the defendant.

Upon the receipt of the verdict the trial court made in substance the following findings:

"The plaintiff was induced by the claim agent by reason of his falsely representing that she would be defeated in a case for her personal injuries, and that the $210 paid was in the nature of a gift and at least not to cover any claim made by her except for loss or damage to personal property, and that it was a mere receipt, and that he substantially kept her from reading it by covering it with his hand, and by stating to her that if she could not trust him he could not trust her."

The circuit court thereupon filed a written opinion wherein it held and found that, because of manifest prejudicial error in the trial of the action in the civil court, the defendant has not had a fair trial thereof in said court, and that substantial justice cannot otherwise be done than by reversing the judgment of the civil court and ordering a new trial. The judgment of the civil court was thereupon reversed and a new trial ordered.

For the appellant there was a brief by *Cannon, Waldron & Schweichler* of Milwaukee, attorneys, and *M. L. Lueck* of Beaver Dam, of counsel, and oral argument by *Mr. Lueck.*

Samuel H. Cady of Milwaukee, for the respondent.

DOERFLER, J. We have set out in considerable detail the evidence with respect to the happening of the injury, mainly for the purpose of showing the merits of plaintiff's

case on that branch of the controversy, for in order to satisfactorily determine the question as to whether the alleged settlement made with the plaintiff was induced by fraud the evidence on the merits becomes a vital factor. Compromise settlements are greatly favored in the law, and when made, particularly when evidenced by writings signed by the claimant, cannot be impeached on the ground of fraud or mistake unless the evidence clearly and convincingly, beyond reasonable controversy, establishes such mistake or fraud. *Rayborn v. Galena I. W. Co*: 159 Wis. 164, 169, 149 N. W. 701; *Schweikert v. John R. Davis L. Co.* 147 Wis. 242, 133 N. W. 136; *Kenese v. Cudahy Bros. Co.* 167 Wis. 378, 381, 167 N. W. 750; *Bessey v. M., St. P. & S. S. M. R. Co.* 154 Wis. 334, 141 N. W. 244.

True, the burden of proof on a settlement of this kind is upon the defendant; but when a proper release, duly executed and signed, has been shown by the defendant, such settlement has not only been presumptively shown, but can only be overcome by evidence in the case on the part of the plaintiff which, as above stated, is clear, satisfactory, and convincing beyond reasonable controversy.

It appears that the plaintiff sustained substantial injuries, for which the jury assessed damages in the sum of $1,500. The amount paid in the settlement, therefore, appears not to be reasonably commensurate with the actual damages. In determining what would be a reasonable settlement under the circumstances we must consider not only the actual damages sustained, but, among other things, the reasonable probability of plaintiff's ultimate success based upon the merits of the case. A careful analysis of the evidence clearly discloses that plaintiff's case has no support in the evidence, excepting only by her unsupported and highly improbable version. All the surrounding facts and circumstances and the physical facts in the case, which to a large measure are controlling in every personal-injury case, refute her statements. On the morning in question, according to her own

statement, plaintiff left her home ten minutes after the usual hour in order to board this 7:45 train. When she left the street car at Reed street and National avenue, her companion, Sullivan, remarked that it was late and that they would have to hurry for the train. The train officials and other employees of the company clearly testified that, when the signal was given for the train to start, all of the passengers had boarded the train. Sullivan, plaintiff's companion, testified that they ran from Reed street and National avenue to the station and hurried up the flight of stairs in order to reach the platform. At least three disinterested witnesses, employees of the Newport Chemical Company, including Sullivan, testified that when plaintiff attempted to board the train the same was moving. There is convincing evidence on the part of the railway company's employees and of the other witnesses that when plaintiff attempted to board the train she endeavored to run along with the moving train and that the train was going somewhat faster than plaintiff, and that in an effort to catch the hand-rail she was unbalanced and thrown to the platform. Such evidence, it appears, is in harmony with the physical facts. Under these circumstances we are fully convinced that plaintiff's version as to the reasonable probability of the accident having happened in the manner in which it is claimed by the plaintiff is barely credible, and we are inclined to the opinion that if the case had been presented to this court on that phase alone we could not, in accordance with the prior rulings of this court, permit the judgment of the civil court to stand.

From what has been said, we therefore hold that when the plaintiff presented herself at the office of the claim agent of the company at the time when the alleged settlement was made, she had, to say the least, an extremely doubtful cause as far as legal liability of the company is concerned. Plaintiff, being an intelligent young lady twenty-four years of age,

and having occupied for at least seven years of her life important positions of responsibility, the performance of which requires intelligence and aptness, and being fully able to read, write, and understand the English language, stands in a position before this court entirely different from the average person claiming relief on account of fraud in the execution of a release. In many of the cases the claimants are foreigners, unable to read, write, or understand the English language, and thus afford an opportunity for effective fraudulent practices. In other cases advantage is taken of the claimant by reason of pain, suffering, and disability resulting from the injuries, thus disqualifying the claimant, to a large extent, from forming a rational judgment and from exercising that degree of care which a normal person would exercise under the same circumstances. None of these conditions were present in the instant case.

In *Bessey v. M., St. P. & S. S. M. R. Co.* 154 Wis. 334, 141 N. W. 244, where a settlement was made with the plaintiff for rather serious personal injuries for a trifling sum, the plaintiff charged that it was represented to him that the amount paid was for wages and that the writing which he signed was merely a receipt for such wages, and where it also appeared that at the time of the execution of the release the plaintiff, by reason of pain and suffering, was unable to clearly comprehend and understand the transaction, this court reversed the judgment of the circuit court, and in its opinion used the following language:

"These evidentiary facts and many of the accompanying circumstances, together with the plaintiff's conduct in the matter, make it clear that he was not misled nor deceived into signing the release under the belief that it was a mere receipt for two months' wages. The evidence falls far short of the legal requirements to impeach the formal written release. In probative force it is not of such weight and credibility as to constitute clear and convincing proof beyond reasonable controversy of the alleged fraud in pro-

curing plaintiff's signature to the release, and therefore as a matter of law does not sustain the finding of the jury on this question."

In the case of *Kenese v. Cudahy Bros. Co.* 167 Wis. 378, 167 N. W. 750, this court refused to sustain the findings of the jury that the release was obtained by fraud, and in its opinion says:

"There is no dispute but that the plaintiff signed the release, but he avers that he signed it under the belief that he was signing a receipt for $50 which defendant offered to pay him as wages. Plaintiff is unable to understand, speak, read, or write English; he denies that he and Daly, defendant's manager, had any negotiation of settlement before the paper was signed; he states that the contents of the paper were not translated to him by Dr. Junge, his attending physician at the hospital where the paper was signed; that it was not explained to him; that he did not ask the doctor to translate it; that he did not know it was a release, and that he did not know that he had a claim against the defendant."

In this case the court further said:

"The record fails to show the quantum and character of evidence which is required in order to find that the fraud charged has been established by clear, satisfactory, and convincing evidence."

The case at bar is infinitely stronger, from the standpoint of the defendant, than any of the cases above referred to, and in fact it might truthfully be said, stronger than any of the cases in our Reports. Plaintiff testified that she could have read the release if she had desired; in fact, when the duplicate was handed to her for signature, no effort whatever was made by the claim agent to obstruct her view. She received the check, which she was fully able to understand and had ample opportunity to read, and took it, unaccompanied, from the claim agent's office to the office of the railway company and had it cashed. This check on its face contained a provision which informed her that it was in full payment not only of her damage to and loss of per-

sonal property, but in full satisfaction and release of her claim for personal injuries. Taking the plaintiff's statement as true, that the claim agent placed his hand on one of the releases so as to prevent her from reading it, such fact at least would have put the ordinary person on suspicion, and would have induced her to read the contents of the check while she was alone and when she had ample opportunity so to do.

Prior to the time plaintiff called on defendant's claim agent she had a conference with her brother, who was a railroad employee, and he advised her that if the offer of settlement was not satisfactory she could refuse to accept the same and then sue for damages.

The entire case is so shrouded in improbabilities, so contrary to human reason, and so opposed to the physical facts, that the circuit court should have reversed the judgment of the civil court and dismissed the complaint.

Under the circumstances, with the view that we have thus expressed, it would be merely an idle ceremony to affirm the order of the court below. In accordance with our view, therefore, we direct that the judgment of the civil court should be reversed, and the cause remanded with instructions to the circuit court to dismiss the plaintiff's complaint, with costs.

By the Court.—It is so ordered.

PERA, Appellant, vs. VILLAGE OF SHOREWOOD, Respondent.

January 13—February 7, 1922.

Constitutional law: Filing claim under statute: Right to attack statute as invalid: Ordinance creating residential and business districts in villages: Damages to property owners.

1. Where a village was divided into business and residential districts by ordinance passed pursuant to sec. 61.35, Stats., and a property owner, under the provisions of the statute,

filed a claim for damages because his property was placed in the residential district and he was prevented from using it in carrying on most kinds of business, he may not attack the validity of the statute, although in his claim he stated that he submitted it without prejudice to contest the validity of the ordinance.

2. In an action for damages to plaintiff's property from being placed in the residential district, under sub. (4) of said sec. 61.35 (declaring that the issue on appeal to the circuit court from the decision of the village board shall be the loss or damage sustained by the appellant), the validity of the statute may not be attacked on appeal, as the only question to be litigated under the terms of the statute is the amount of damages sustained by the property owner.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The village of Shorewood, located in Milwaukee county, passed an ordinance pursuant to sec. 61.35, Stats. 1919, dividing it into residence and business districts. Plaintiff owned property located on one of the principal business streets of the village and less than a block from present business buildings. By the provisions of the ordinance his property was left in a residence district where business of practically all kinds was prohibited. Pursuant to sub. (4) of the statute mentioned he filed a claim for damages with the village clerk which was wholly disallowed. From such disallowance he appealed to the circuit court for Milwaukee county as provided for in said sub. (4). Upon the appeal pleadings were filed in the circuit court. The answer set up the ordinance passed pursuant to the statute; alleged that sub. (2) and (4) of the statute were unconstitutional, contrary to public policy, illegal class legislation, and void. Sub. (2) of the statutory section relates to the use of injunctional orders to enforce the regulations of the ordinance and sub. (4) to the filing of claims by property owners for damages and for an appeal to the circuit court from a disallowance in whole or in part of such claims. The plaintiff demurred to the answer on the ground that

it did not state a defense. The court overruled the demurrer and further held that the village was not liable for damages occasioned by the enactment of the zoning ordinance because there was no taking of private property for public purposes. From such order and ruling the plaintiff appealed.

For the appellant there was a brief by *Rix & Barney,* attorneys, and *David A. Sondel,* of counsel, all of Milwaukee, and oral argument by *Mr. Sondel* and *Mr. Carl B. Rix.*

Charles E. Hammersley of Milwaukee, village attorney, for the respondent.

A brief was also filed signed by *Fish, Marshutz & Hoffman* as *amici curiæ* and *I. A. Fish,* of counsel, all of Milwaukee, and a separate brief by *John M. Niven* and *C. W. Babcock,* both of Milwaukee, as *amici curiæ,* and oral argument by *Mr. Babcock.*

VINJE, J. The only question raised by the plaintiff on his appeal is the constitutionality of sec. 61.35, Stats., delegating the power to the village to pass an ordinance dividing the village into districts. He claims it is unconstitutional for various reasons. Upon the state of the record and the statute referred to we cannot pass upon the question raised. When plaintiff filed his claim with the village for compensation for damages caused by the districting of the village he asserted the validity of the ordinance, though the claim as filed contained this statement:

"This claim is submitted and filed without prejudice to any of the rights and privileges of the claimant to contest the validity of said ordinance."

This reservation may well preserve the right of the plaintiff to contest the validity of the ordinance in a proper proceeding, but it cannot have that effect in the proceeding now before us. As stated, the filing of the claim asserted the validity of the ordinance and the statute under which it

was passed, otherwise the plaintiff could not contend that his claim had any validity. When he took his appeal to the circuit court from its disallowance by the village he did so as an aggrieved party, again asserting by his acts the validity of the ordinance. So he came into court relying upon the ordinance as the valid basis for his claim. Having instituted his action upon the sole basis of the validity of the ordinance, he cannot now seek to maintain it by asserting the invalidity of that which enabled him to come into court. This case is parallel with that of *Hurley v. Commission of Fisheries* (U. S.) 42 Sup. Ct. 83, decided by the supreme court of the United States December 5, 1921, where it was held that a plaintiff could not claim under a statute and assail it in the same proceeding. To do so would enable parties to make use of a statute as a valid one during one stage of an action, and then, upon a certain point therein being reached, continue it upon the basis that it is invalid because from thence on it seems to be more advantageous to claim its invalidity. This is a species of legal somersault or suicide that courts will not tolerate. Parties cannot pursue two inconsistent remedies in the same action. 9 Ruling Case Law, 958.

There is another reason why the constitutional question should not now be decided, though it may not be so conclusive. Such reason is that the statute providing for an appeal to the circuit court (sub. (4), sec. 61.35) declares that the issue upon such appeal shall be the loss or damage sustained by the appellant, and that such issue shall be tried without further pleadings. The legislative thought was that the appeal should bring up only the issue of damages; and, this being strictly a statutory proceeding, the issue can neither be enlarged nor diminished by new pleadings, as was sought to be done here. The trial court should have limited itself to the question of damages only, and should not have passed upon the constitutionality of the ordinance. In this proceeding the ordinance must be presumed to be valid.

The trial court further held that the village was not liable for any damages because there was no taking of private property for public use. Since the constitutionality of the statute or ordinance may properly come before us in another proceeding we shall content ourselves now by merely indicating that such holding was erroneous and that plaintiff is entitled to have such damage assessed as he may be able to prove. The facts before us show a *prima facie* case for damages. Whether there is a taking under the police power or under the power of eminent domain we do not decide. Such questions had best be left undecided till the constitutionality of the statute or ordinance comes up for decision. Plaintiff may not desire to prosecute his appeal in the circuit court, in which case he can dismiss it. We must presume, however, that he still desires to prosecute the remedy he invoked and relied upon when he began the proceedings, namely, to enforce his claim for damages.

By the Court.—Order reversed, and cause remanded with directions to proceed to ascertain and assess plaintiff's damages.

ESTATE OF AUSTIN.

January 13—February 7, 1922.

Executors and administrators: Claims against estate: Services gratuitously rendered: Trustee handling property as his own: Compensation.

1. Evidence taken upon a claim filed against an estate in the county court showing that the deceased and his brother turned over their property to claimant, who was a nephew of deceased, for investment and management under an agreement that claimant would receive no compensation except such remuneration as he might receive from borrowers, and that claimant was guilty of malfeasance in the handling of the estate, is *held* to sustain the finding of the court that claimant had no expectation of receiving compensation from deceased, but conceived the idea of making a claim therefor when his authority over the estate was revoked.

2. In this case, where claimant dealt with trust funds as his own and in numerous cases used them to his own advantage, he could not claim compensation for his services.

APPEAL from a judgment of the county court of Milwaukee county: M. S. SHERIDAN, Judge. *Affirmed.*

In the year 1844 Samuel Austin, the father of the deceased, J. Clinton Austin, and J. Darwin Austin, settled on a homestead of 160 acres adjacent to the southern boundary of the city of Milwaukee. In time additions were made to the father's holdings. Upon the death of the father in 1878 the deceased, J. Clinton Austin, and J. Darwin Austin occupied and farmed the lands which they inherited from their father in common and carried on a joint business. In 1894 a division of their real estate was proposed, but the negotiations were not consummated until 1914. About two years later, in 1916, a division was made of their personal property. The claimant, *Samuel D. Austin,* is a civil engineer, the son of J. Darwin Austin, and from time to time made surveys and performed services in and about the management of the joint estate, and upon the death of J. Clinton Austin filed a claim against the estate of J. Clinton Austin, amounting to $11,834.25, on account of such services. On behalf of the estate there was a counterclaim for $11,500 on account of moneys due and owing from the claimant, *Samuel D. Austin.* The principal claim of *Samuel D. Austin* related to surveys made by him of the property of his father and uncle, the deceased J. Clinton Austin, and a division of the real estate and securities held by them. For the last two items there was a charge of $7,500. The trial court found that the reasonable value of the services performed by *Samuel D. Austin* in respect to the division of the estate was $500; that in the year 1913, when the property was turned over by the deceased, J. Clinton Austin, and J. Darwin Austin to *Samuel D. Austin* for supervision, management, investment and reinvestment, it was expressly understood and agreed "that the said *Samuel D. Austin*

would do such work without compensation whatever from the said Austin brothers or either of them, and would derive and receive in lieu of compensation such reasonable and lawful remuneration as he could obtain from the borrowers," and that pursuant to such agreement the said *Samuel D. Austin* assumed the management and control of the personal property and securities of the said Austin brothers, made investments and reinvestments from time to time, collected interest, and generally supervised and managed the property intrusted to him and received commissions from third parties, which he retained, and for which he has never accounted to the Austin brothers or either of them. The court finds that the reasonable value of the services rendered by said *Samuel D. Austin* to J. Clinton Austin in the division of the personal property was $200. It appears that in the making of investments said *Samuel D. Austin* treated the funds of his father and uncle as his own. Securities were taken in his own name, he accepted mortgages upon properties sold by him for part of the purchase price, and was guilty of many acts of malfeasance in the management of his trust; that he failed to exercise due care in the making of investments, procuring of abstracts, recording of mortgages, attachment of revenue stamps, and in other particulars violated his obligations as a fiduciary. The court further found that *Samuel D. Austin,* the claimant, at no time did any of the work or the things herein referred to or set forth in the findings in detail with the expectation of receiving any compensation therefor from J. Clinton Austin, but by way of resentment to the revocation of his authority (a few months before the death of J. Clinton Austin) the claimant for the first time conceived the idea of presenting a statement for services rendered, after the revocation of his authority as such agent and trustee.

The court found as conclusions of law that *Samuel D. Austin,* in the management of the estate, was guilty of maladministration; was guilty of a conversion of a large

amount of the personal property belonging to said J. Clinton Austin; that the account of *Samuel D. Austin* did not constitute a mutual and open account current; that all items in said account prior to a period of six years previous to the death of J. Clinton Austin are barred by the statute of limitations, and disallowed the entire claim and rendered judgment against *Samuel D. Austin* for $11,500, principal and interest. From the judgment disallowing his claim *Samuel D. Austin* appeals.

Charles M. Scanlan of Milwaukee, for the appellant.

Andrew D. Agnew of Milwaukee, for the respondent.

ROSENBERRY, J. We have stated very briefly and in bare outline the nature of the questions litigated in this action. To state the matters in detail would require a long opinion which would serve no useful purpose. Two principal questions are presented upon this appeal:

First. Are the findings of the trial court sustained by the evidence?

Second. Did the trial court, in disposing of the matter, apply correct principles of law?

In regard to the mismanagement and malfeasance in office of the claimant, it should be said that the estate of J. Clinton Austin suffered no financial loss, it being claimed that this happy result is due to the increasing value of the properties upon which securities were taken. Whether it be that or that the loans were providently made, the fact remains that no financial loss was sustained. We have carefully reviewed the evidence and the arguments of counsel, and it is considered that the evidence fully sustains the finding made by the trial court.

The trial court also so applied the correct principles of law. While the relation of the claimant to J. Clinton Austin was not that of father and son so that the presumption that the services were gratuitous does not apply to its full extent, nevertheless the relation was of such a character that

the court very properly scrutinized the evidence closely in determining whether or not there was an implied promise to pay. The evidence fully sustains the conclusion of the court that the services were rendered without expectation of payment and therefore gratuitously, and that when the properties were turned over to him for management and supervision it was upon the express understanding that he should receive no compensation excepting that which he derived from third parties by way of commission.

We are also of the opinion that the conclusion of the trial court that the services rendered were of such a character, including, as they did, the making of many improvident investments and the conversion of funds in his hands as trustee, that claimant was estopped from making a claim for services rendered by him, is fully justified. He dealt with the trust funds as his own, used them in numerous cases for his own advantage, and while he was not required to account for any profits made by him, he certainly is in no position to claim compensation.

By the Court.—Judgment affirmed.

STATE EX REL. TIME INSURANCE COMPANY, Relator, vs. SUPERIOR COURT OF DOUGLAS COUNTY and others, Respondents.

January 13—February 7, 1922.

Insurance: Action against company: Wrongful discharge of agent: Venue: Statutes: Amendments: Construction: Repeal and re-enactment of statutes.

1. The right of an insurance agent, under sec. 2619, Stats., to bring an action against his principal, the insurance company, for the wrongful termination of the agency, in the county where the cause of action arose, was not affected by the amendment of that section by ch. 334, Laws 1919, interpolating a new subdivision 5, as to actions against a domestic insurance company "to recover on a policy of insurance."

2. The fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature.
3. The general rule is that the spirit or reason of the law will prevail over the letter; and to ascertain the object the legislature had in mind in the amendment of a statute it is proper to consider the occasion and necessity thereof, the defects and evils in the former law and the remedy provided by the new one, and construe it in such a way as is best calculated to suppress the mischief and secure the benefits intended.
4. Even if by amendment a statute had been repealed, and re-enacted in the same words, by an act which took effect at the same time as the repealing act, the portion of the statute re-enacted would continue such former statute in uninterrupted operation, and there would be no change in the law.

PETITION for a peremptory writ of *mandamus*. *Writ quashed.*

This matter comes before this court on the petition of the relator for a peremptory writ of *mandamus*, to change the place of trial of a certain action in which *S. D. Wenneby* is plaintiff, and the *Time Insurance Company*, a domestic insurance corporation, defendant, from the superior court of Douglas county to Milwaukee county.

For the relator there was a brief signed by *Julius E. Roehr*, of counsel, and *Roehr & Steinmetz*, attorneys, all of Milwaukee, and oral argument by *Julius E. Roehr*.

For the respondents there was a brief by *Grace, Fridley & Crawford* of Superior, attorneys, and *Daniel H. Grady* of Portage, of counsel, and oral argument by *William Ryan* of Madison.

DOERFLER, J. Prior to the enactment of ch. 334 of the Laws of 1919, sec. 2619 of the Statutes provided that in actions against corporations existing under the laws of this state, excepting those mentioned in the fourth subdivision of said statute, the proper place of trial was either in the county in which the corporation is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose.

It appears from the complaint that the plaintiff, under a written contract entered into at the city of Superior in said Douglas county, became the district representative of the defendant insurance company for the counties of Douglas, Bayfield, Barron, Washburn, Sawyer, and Burnett, and that she maintained offices in the city of Superior and conducted her business there as such representative; that the plaintiff established a large and valuable business, and that on March 31, 1921, the defendant, without any right or authority, and without any notice whatsoever of the termination of said contract, and in violation of the plaintiff's rights, took possession of her said office and business, together with all of her books, papers, records, etc., and office furniture, and excluded her therefrom, to her great damage.

It is claimed by the respondents that the proper place of trial of said action is in Douglas county, and on the other hand it is claimed by the relator that such proper place of trial is in Milwaukee county.

Sec. 2619 of the Statutes of 1919 (such section being now in full force) among other things provides:

"Section 2619. The proper place of trial of civil actions is as follows: . . .

"Fourth. Of an action against any railroad corporation as defined by section 1861, or against any corporation owning or operating any interurban railroad, except appeals in condemnation proceedings, either in the county in which the cause of action arose or in that in which the plaintiff resides, if the road of such corporation extends into either such county; if such road does not extend into either such county, the action may be commenced in any county into which the road of such corporation does extend.

"Fifth. Of an action against an insurance company, existing under the laws of this state to recover on a policy of insurance, the county in which the defendant has its principal office, or, at the election of the plaintiff, if a resident of this state, the county in which the plaintiff resides or if the action is brought by a person in a representative capacity

by appointment of a court of this state, the county in which the proceedings resulting in such appointment was had.

"*Against other corporations.* Sixth. Of an action against any other corporation existing under the law of this state, the county in which it is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose.

"*Other actions.* Seventh. Of any other action, the county in which any defendant resides at the commencement of the action; or if neither defendant resides within this state, any county which the plaintiff designates in his complaint."

The eighth, ninth, and tenth subdivisions are omitted, not being material to the issues involved.

Prior to the enactment of ch. 334 of the Laws of 1919 the fifth subdivision above set forth was not included in said section of the statutes, and the sixth was numbered as fifth, the seventh as sixth, the eighth as seventh, and the ninth as eighth, so that the only difference between sec. 2619 as amended by the legislature in that year and as it existed prior to that time consists of the interpolation of the fifth subdivision and the renumbering of the subsequent subdivisions of said section as above indicated.

It is contended by the relator that it was the intention of the legislature by such interpolation of the fifth subdivision and the renumbering of the subsequent subdivisions to constitute the proper place of trial in actions against domestic insurance companies other than those brought against an insurance company existing under the laws of the state, to recover on a policy of insurance, the county in which the defendant resides at the time of the commencement of the action, etc. On the other hand, the respondents maintain that the only object and purpose of the legislature in enacting ch. 334 of the Laws of 1919 was to fix a proper place of trial for actions brought against an insurance company existing under the laws of this state to recover on a policy of insurance, and that all actions against corporations existing under the laws of this state, other than those

mentioned in the fourth subdivision of said section, are triable in the county in which the corporation is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose, and that inasmuch as the complaint alleges that the cause of action herein arose in Douglas county, that county is a proper place of trial of such action.

In order to give sec. 2619 as amended by the legislature of 1919 a proper construction, it is necessary to ascertain, if possible, the intent which the legislature had in mind in making such amendment. A literal construction of the statute in question, as so amended, would clearly bring the proper place of trial under the seventh subdivision of said statute as above set forth.

On April 24, 1917, a decision was rendered by this court in *State ex rel. Northwestern Mut. L. Ins. Co. v. Circuit Court*, 165 Wis. 387, 162 N. W. 436, in which it was held that where the insurance policies are issued in Milwaukee, the principal place of business of the domestic company, and are payable there, and where notice and proofs of death were to be furnished to the company at Milwaukee, and where the plaintiff in the action resided in Waushara county and was there appointed administrator of the estate of the deceased policy-holder, the proper place of trial was in Milwaukee county. As the result of such decision, many life insurance policy-holders were vitally affected in this state and were obliged to maintain suit on their policies in the county where the principal office or place of business of the company was located and the insurance was payable, so that when the legislature convened in its session of 1919 the amendment as aforesaid was enacted.

Bearing therefore in mind the reason for the amendment and the object and purpose the legislature had in mind in enacting the same, and the language of the amendment, it becomes clear that it had no other purpose than to fix a place of trial in an action against an insurance company ex-

isting under the laws of this state to recover on a policy of insurance, so as to enable a plaintiff, at his election, if a resident of this state, to bring his action in the county in which he resides, or if the action be brought by a person in a representative capacity, by appointment of a court of this state, the county in which the proceeding resulting in such appointment was had. No other plausible reason can be assigned for the amendment, and, in fact, the entire statute, with the exception of the interpolation of the fifth subdivision and the renumbering of the subsequent subdivisions, remains in force to the full intent and purpose as it existed prior to 1919.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. 36 Cyc. 1106; *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846. The general rule is that the spirit or reason of the law will prevail over the letter. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Comm., supra; Wis. Ind. School v. Clark Co.* 103 Wis. 651, 79 N. W. 422; *Gilkey v. Cook,* 60 Wis. 133, 18 N. W. 639. It has also been held that, in order to ascertain the object the legislature had in mind, it is proper to consider the occasion and necessity of the enactment, the defects or evils in the former law, and the remedy provided by the new one, and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended. 36 Cyc. 1110. And every statute is to be construed with reference to the general system of laws of which it forms a part, and must therefore be interpreted in the light of the customary or unwritten law, of other statutes on the same subject, and of the decisions of the courts. So that, bearing in mind that the decision in *State ex rel. Northwestern Mut. L. Ins. Co. v. Circuit Court,* 165 Wis. 387, 162 N. W. 436, was rendered in 1917, and that as the result of such

decision a great inconvenience resulted to a large number of policy-holders residing in all parts of the state, and that the amendment referred to follows immediately as the act of the next legislature, the conclusion irresistibly fastens itself upon one's mind that the relief by amendment intended by the new legislation was to afford policy-holders affected by such decision a more convenient forum. This construction, under the authorities above cited, gives effect to the spirit of the law, notwithstanding, as above stated, a literal construction leads to the conclusion contended for by the relator.

Even if by the amendment the statute had been repealed and re-enacted in the same words by an act which takes effect at the same time as the repealing act, the portion of the statute re-enacted would continue in uninterrupted operation such former statute, and there would be no change in the law. *Laude v. C. & N. W. R. Co.* 33 Wis. 640; *Glentz v. State,* 38 Wis. 549, 554; *State v. Gumber,* 37 Wis. 298; *Fullerton v. Spring,* 3 Wis. 667; *Hurley v. Texas,* 20 Wis. 634.

We therefore hold that the motion of respondents to quash the alternative writ of *mandamus* must be granted.

By the Court.—It is so ordered, and the order staying proceedings is vacated.

TWOHIG, Respondent, vs. TWOHIG, Appellant.

January 14—February 7, 1922.

Divorce: Division of estate: Allowance to wife: Custody of children: Appointment of trustee for wife: Discretion of court.

1. In a divorce action, an allowance to the wife of the use of the homestead for life, taxes and insurance upon which the husband was required to pay, and an award to her of $5,082.15 out of the balance of the property, amounting to $6,554.37, is

excessive, even though the wife has debts in the sum of $2,000, and the property of the parties, which had been largely earned by their joint labors, will after the payment of all debts be equally divided.

2. Where a decree is granted to the husband but the wife is charged with the maintenance of the children, it is proper to allow the wife more than the usual one third, even though her marital delict is the greater.
3. It was proper to give the custody of two minor daughters, aged thirteen and eight, to the wife, notwithstanding she was guilty of desertion, where there is no claim that the wife was not morally fit to care for the children.
4. If the trial court has refused to appoint a trustee for the wife, such action will not be disturbed unless an abuse of discretion appears.

APPEAL from part of a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Modified and reversed.*

Action for divorce. A decree was granted to the defendant on the ground of plaintiff's desertion. Her claim for divorce on the ground of cruel and inhuman treatment was not sustained. The court awarded plaintiff the custody of the two minor daughters of the parties, aged respectively thirteen and eight years; gave her the use for life, or widowhood, of the homestead in Fond du Lac, valued at $6,000, and $5,082.15 in cash, including household furniture of the value of $600. It gave the defendant $1,472.22 in cash and the homestead mentioned, subject to the wife's estate for life or widowhood; required him to pay the taxes and insurance on the homestead, and $12 per month each for the support of the two minor daughters until each reached the age of eighteen years.

From that part of the judgment dividing the property as above stated and from that part thereof adjudging the custody of the two minor daughters to the plaintiff and refusing to appoint a trustee for her the defendant appealed.

T. L. Doyle of Fond du Lac, for the appellant.

For the respondent there was a brief by *Reilly & O'Brien* of Fond du Lac, and oral argument by *J. E. O'Brien.*

VINJE, J. At the time of the divorce the plaintiff was about fifty years of age and the defendant about fifty-two years. He was earning from $80 to $100 per month as a motorman, but was not in very good health. At the time of their marriage he had about $1,800 and she had about $50 in cash and some household linen, etc. The balance of the property owned by them had been earned by their joint labors.

There is no dispute as to the total value of the property as found by the court. Such value, exclusive of the homestead, was $15,676.18. The indebtedness of the parties was as follows: mortgage and interest on their farm $4,111.81, mortgage and interest on their homestead in Fond du Lac $1,610; debts of the defendant $1,400, and debts of the plaintiff $2,000, aggregating in all $9,121.81, leaving their net property value, exclusive of the homestead, at $6,554.37, out of which the court allowed the wife $5,082.15 and the husband only $1,472.22, charging him also with the taxes and insurance on the homestead as long as plaintiff occupied it. This was too large an allowance to the wife and must be modified. It is the view of the court that all the property owned by them should be divided finally so that they need have no further business dealings. This necessitates a change in the judgment as to the homestead. The court deems it should be set over to the wife absolutely, subject to the mortgage and interest of $1,610, and that she should receive one half of the net value of all their property. Adding the value of the homestead to the net value of their other property as stated above makes the net value $12,554.37, one half of which is $6,277.18. The value of the homestead subject to the mortgage and interest is $4,390, leaving the wife's share of the cash at $1,887.18. The debts of both parties were contracted during marriage and the husband is liable for them, and they will be paid by him out of the property before division, or out of his share as above determined. There is

some doubt as to the amount of the wife's debts, but she claimed they amounted to about $2,000, and her claim will be taken as true. We allow the wife one half because she is charged with the maintenance of the two minor daughters except his contribution of $12 each per month till they reach the age of eighteen years. This we think under present economic conditions throws the greater burden upon her and she should have more than the usual one third even though her marital delict was the greater. *Roder v. Roder,* 168 Wis. 283, 169 N. W. 307.

We think the court properly awarded the custody of the two minor daughters, aged respectively thirteen and eight years, to the wife. *Jenkins v. Jenkins,* 173 Wis. 592, 181 N. W. 826. While it correctly found she deserted her husband, such desertion was at least in part due to radical differences that had grown up between them, and there is no claim that she is not morally fit to care for them. Their best home is with the mother, subject to such visits of the father as the judgment provided.

There is a claim and some showing that the wife was extravagant, but we cannot say the trial court abused its discretion in refusing to appoint a trustee for her. The court's action in that respect will not be disturbed unless an abuse of discretion appears. *Slowikowski v. Slowikowski,* 172 Wis. 460, 179 N. W. 510.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment as indicated in the opinion. Each party will pay his own costs, and the defendant will pay the clerk's fees in this court.

QUAKER MAID CORPORATION, Appellant, vs. NEW HOLSTEIN CANNING COMPANY, Respondent.

January 14—February 7, 1922.

Sales: Refusal of seller to perform: Complaint: Modification of contract: Non-negotiable checks: Revenue stamps on checks.

1. A complaint for breach of contract to sell peas "subject release after embargo within next two weeks," alleging that the embargo was released April 26, 1920, states a cause of action, though it alleged that the contract was made April 10th, where the final confirmation thereof was dated April 12th, and it appeared from the correspondence attached to the complaint that both parties interpreted the contract as expiring on April 26th, since defendant could not, as alleged in the complaint, rely on the provisions of the contract with reference to the embargo as grounds of cancellation.
2. Where the seller proposed to extend the time of performance of the contract on condition that the buyer send a check "to hold until such time when we will be able to get permission to make shipment," a check indorsed "Not to be deposited until shipment of peas has been made as per terms of sale" was non-negotiable and did not comply with the seller's request, so that there was no modification of the contract as to time of performance.
3. Defendant's claim that it had a right to reject the check of plaintiff because it bore no revenue stamp is immaterial where it does not appear that the check was rejected in fact.

APPEAL from an order of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

Demurrer. The amended complaint, after setting out the corporate character of the parties, alleged that on the 10th day of April, 1920, the parties entered into an agreement in writing by telegram, letters, and memoranda, copies of which are attached to the complaint, and that by said written agreement it was mutually agreed that the defendant would sell and deliver to the plaintiff f. o. b. cars at New Holstein, Wisconsin, 2,000 cases of Standard No. 4 Alaska peas at $1.10 per dozen; that thereafter the contract was modified so as to include an additional 125 cases. It

appears from the correspondence that the contract contained the following clause: "Subject release after embargo within next two weeks." The complaint further alleged that on April 30, 1920, the defendant notified the plaintiff "that it would not deliver said peas nor ship the same, nor any part thereof, and notified the plaintiff that it had canceled its contract and agreement to deliver said peas and the sale thereof, on the sole ground that it relied upon the provisions of the contract with reference to the embargo conditions therein contained." It was further alleged that the defendant canceled the order by reason of the fact that it was able to secure a better price for the goods. It was further alleged:

"The plaintiff further alleges, on information and belief, that the embargo on said shipment was released and that the defendant company had full power and permission to ship said goods the 26th of April, 1920, and thereafter."

There was an allegation of full performance by the plaintiff and a claim for damages in the amount of $743.75. It appeared from the exhibits annexed to the complaint that upon April 21st the defendant wrote the representative of the plaintiff as follows:

"We have a car standing in readiness to load these goods in, but as yet they will not permit us to load same; however, from present indications, are inclined to believe that we will be in a position to get these goods moved in the very near future.

"Since selling these goods we have received an offer of $1.15 and no doubt could have obtained $1.20, but since they are sold, this does not concern us; but if we are unable to make shipment of these goods on or before the 26th of this month, we would ask that your client favor us with a check covering payment of the 2,000 cases to hold until such time when we will be able to get permission to make shipment."

Thereafter the plaintiff sent to the defendant his check for $4,334, upon the face of which was indorsed the fol-

lowing: "This check not to be deposited until shipment of peas has been made as per terms of sale."

To the check there was attached a memorandum as follows:

In account with
New Holstein Canning Co., New Holstein, Wis.

2,000 cases Standard No. 3 Alaska Peas at $1.10 per dozen	$4,400
Less 1½ per cent	66
	$4,334

with directions that the memorandum should be detached and retained before deposit of the check. No revenue stamp was placed upon the check. From an order sustaining the demurrer plaintiff appeals.

For the appellant the cause was submitted on the brief of *L. P. Fox* of Chilton.

H. F. Arps of Chilton, for the respondent.

ROSENBERRY, J. The trial court, in sustaining the demurrer to the original complaint, filed a written opinion.

The complaint was thereupon amended in several particulars. The demurrer to the amended complaint was thereafter sustained without opinion. The final confirmation is dated April 12, 1920, and although the complaint alleges that the contract was made on the 10th day of April, we think that allegation is controlled by the correspondence attached, it appearing that both parties interpreted the contract as expiring on April 26th by its terms. The complaint alleging that the embargo was released on April 26, 1920, the defendant could not, as alleged in the complaint, rely upon the provisions of the contract with reference to the embargo as grounds of cancellation. Therefore it must be held that the complaint states a cause of action.

The proposal made by the defendant in its letter of April 21st was a proposal to extend the time of performance upon

condition that the buyer, the plaintiff, send the defendant a check "to hold until such time when we will be able to get permission to make shipment." In response to that proposal the plaintiff sent its check, upon the face of which was the indorsement set out in the statement of facts. Indorsed as it was, the check was clearly a non-negotiable instrument and did not comply with the request of the defendant. Therefore there was no modification of the contract, the proposal made by the defendant not having been accepted by the plaintiff. The time of performance was therefore not extended.

There is some discussion in the case as to the effect of the failure of the defendant to attach a revenue stamp to the check. The defendant admits that under the decision in *State ex rel. Hemmy v. Miller,* 173 Wis. 412, 179 N. W. 815, 181 N. W. 745, the check is not invalid, but argues that, it being unstamped, the defendant might reject it for that reason. The difficulty with this position is that it does not appear that the check was rejected for any reason, the complaint in this respect being very indefinite. If the defendant received the check and retained it as a compliance with the terms of its proposal, a situation would arise which is not presented by the allegations of the complaint in this case. For the reasons stated it is considered that the complaint states a good cause of action and the demurrer should, therefore, have been overruled.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

STATE EX REL. WILLIAMS, Plaintiff, vs. KAEMPFER and others, Election Commissioners, Defendants.

February 15—February 18, 1922.

Municipal corporations: Cities of the first class: Election of city attorney: Constitutional law: Special legislation: Laws embracing more than one subject: Regular municipal elections: Pleading: Demurrer to answer: Sufficiency of complaint.

1. A demurrer to an answer has the effect of presenting the complaint itself for consideration.
2. Ch. 505, Laws 1919, repealing sec. 4 of ch. 35 of the Laws of 1889 (providing that the term of office of the city attorney of Milwaukee shall be four years) and providing that the term of office of city attorneys in cities of the first class shall be two years, to begin in 1922 and end in 1924, and that the city attorney shall be elected at the regular municipal election in any such city to be held on the first Tuesday in April, 1922, required the holding of an election for the office of city attorney in April, 1922, at which time the preceding term expired.
3. Said ch. 505, Laws 1919, is general, though in its practical application it refers only to the city of Milwaukee, and is not violative of sec. 18, art. IV, Const., in that it embraced more than one subject on its face and in its title, as all that is contained in the chapter is germane to its stated purpose.
4. City attorneys of cities of the first class are regular elective officers, and under ch. 505, Laws 1919, requiring city attorneys in cities of the first class to be elected at the regular municipal election to be held on the first Tuesday in April, 1922, an election at which the city attorney is the only officer to be elected is a "regular municipal election" within the meaning of the statute.

ORIGINAL ACTION in this court. *Complaint dismissed.*

For the plaintiff there were briefs by *Max Schoetz, Jr.*, *Clifton Williams,* and *Alfred R. Gandrey,* attorneys, and *Schoetz & Williams,* of counsel, all of Milwaukee, and oral argument by *Mr. Williams* and *Mr. Schoetz.*

For the defendants there were briefs by *William H. Timlin,* attorney, and *Timlin & Dean* and *E. J. Koelzer,* of counsel, all of Milwaukee, and oral argument by *Mr. Timlin* and *Mr. Koelzer.*

The following opinion was filed February 18, 1922:

PER CURIAM. This action was instituted upon leave granted in this court and seeks to prevent the defendants, as election commissioners of the city of Milwaukee, from giving notice for and the holding of a municipal election on the first Tuesday of April, 1922, and a primary election prior thereto for the office of city attorney of said city.

An answer was interposed to which the plaintiff demurred. After oral argument and consideration of the briefs submitted we have reached the conclusion that the challenged action of the defendants in proposing to give notices for and the holding of such elections is legal and proper and will not be restrained, and that the allegations of the complaint, reached for consideration as they are by the demurrer to the answer, are insufficient to state a cause of action and that the complaint should therefore be dismissed upon the merits.

In view of the shortness of the time before the holding of such election this present memorandum is now filed as our determination in the matter. A further opinion will be filed later.

The following opinion was filed March 14, 1922:

ESCHWEILER, J. In April, 1918, *Mr. Clifton Williams*, plaintiff herein, was elected to succeed himself as then city attorney of the city of Milwaukee and for a four-year term. He gave the required bond and continued to act as such until his resignation taking effect December 31, 1921. At that time Mr. John M. Niven was assistant city attorney and assumed, upon such resignation, to act as city attorney. On January 18, 1922, the defendants as election commissioners for said city of Milwaukee held a meeting and decided to give notice for an election in said city for the office of city

attorney on the first Tuesday of April, 1922, and also to hold a primary election therefor.

Subsequently *Mr. Williams,* as an elector, freeholder, and resident taxpayer of the said city, brought this action in this court, on leave having been obtained, on behalf of himself and the other electors and taxpayers of said city to enjoin and restrain the defendants from giving notices for or attempting to hold such proposed elections and also for a judgment declaring Mr. John M. Niven aforesaid to be the city attorney to continue as such until a general municipal election in 1924 could be held.

We have already announced our conclusion that the complaint herein must be dismissed upon the merits. Although an answer was interposed to which plaintiff demurred, yet as the effect of such demurrer is to present for consideration the complaint itself (*State v. Milwaukee,* 145 Wis. 131, 136, 129 N. W. 1101, and cases there cited; *Lyndon L. Co. v. Sawyer,* 135 Wis. 525, 532, 116 N. W. 255), we have disposed of this matter upon consideration of the complaint.

We are of the opinion that the action, challenged here by plaintiff, of the defendants in proposing to arrange for the holding of an election for city attorney of the city of Milwaukee in the spring of 1922 is justified under and required by ch. 505 of the Laws of 1919. That act so far as material here reads as follows:

"An act relating to the election and term of office of the city attorney in all cities of the first class, however incorporated, and repealing section 4 of chapter 35 of the laws of 1889.

" . . . .

"Section 1. Section 4 of chapter 35 of the Laws of 1889 is hereby repealed.

"Section 2. The term of office of the city attorney of all cities of the first class, however incorporated, shall be two years. Said term of office shall begin in the year 1922 and shall terminate in the year 1924. The city attorney of all

such cities of the first class shall be elected for said term of two years at the regular municipal election in any such city to be held on the first Tuesday in April, 1922. From and after the year 1924 the term of office of said city attorney shall be four years, and said city attorney shall be elected at the regular municipal election in any such city to be held on the first Tuesday in April, 1924."

Ch. 35 of the Laws of 1889, referred to in the above act, was one amending the charter of the city of Milwaukee as to the election of, and length of terms of, aldermen, city attorney, justices of the peace, and constables. The section of said ch. 35 which was so expressly repealed by ch. 505 of the Laws of 1919, *supra,* read as follows:

"Section 4. The term of office of the city attorney of the city of Milwaukee shall be four years, and the term of the present incumbent of that office is hereby extended to the third Tuesday in April, 1892."

So much thereof as attempted to extend the term of the then incumbent of the office was held to violate sec. 9, art. XIII, Const., in the case of *State ex rel. Hamilton v. Krez,* 88 Wis. 135, 139, 59 N. W. 593, but no question was there made of the power of the legislature to change the term of that office and no such question is raised here.

In January, 1922, when the defendants proposed to give notices for and to prepare to hold a primary and a general election for the office of city attorney, the following situation was presented: The incumbent of that office, *Mr. Williams,* until his resignation on December 31, 1921, had been elected in April, 1918, to fill the office for a four-year term which would of course end in April, 1922, and ordinarily and necessarily call for the election of some one to become such city attorney at the expiration of the term; on the face of, and by the letter at least of said ch. 505 of the Laws of 1919, *supra,* the legislature had declared that a new term of two years only for such office should begin in 1922 and be filled by an election on the first Tuesday in April,

1922. Unless, therefore, there be some substantial defect in said ch. 505, *supra,* the duty of the defendants to proceed as they did seems clear.

It is urged, however, that said ch. 505 of the Laws of 1919, *supra,* is unconstitutional because a local law and embracing more than one subject and therefore violating sec. 18 of art. IV of the constitution, which provides:

"No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

It is further urged that there is in any event no proper statutory provision requiring the holding of a "regular municipal election" in the city of Milwaukee on the first Tuesday of April, 1922, such as would meet the terms of said ch. 505, and that therefore there is a want of legislative authority for holding the proposed elections.

We are of course not judicially oblivious of the fact that the above quoted ch. 505 in its practical application refers to but one city in the state of Wisconsin, namely, Milwaukee, although such city is not expressly mentioned in said law.

Legislation, however, applicable to but one or less than all of the several classes of cities in this state which have been grouped for such classification by the standard of population therein respectively contained, or to a class or classes dependent upon whether the incorporation thereof was under a special law or under a general law, does not prevent such legislation from being general rather than local within the provision of the constitution just above quoted. Such view is long established by legislative action and by judicial decisions. It has been expressly so held as to cities in the cases of *Johnson v. Milwaukee,* 88 Wis. 383, 390, 60 N. W. 270; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 53, 98 N. W. 954; *Wis. Cent. R. Co. v. Superior,* 152 Wis. 464, 469, 140 N. W. 79; *State ex rel. Bloomer v. Can-*

avan, 155 Wis. 398, 407, 145 N. W. 44. The same has been held as to classifications of counties according to population. *Bingham v. Milwaukee Co.* 127 Wis. 344, 348, 106 N. W. 1071; *State ex rel. Milwaukee Co. v. Buech,* 171 Wis. 474, 483, 177 N. W. 781.

Furthermore, ch. 505, *supra,* in question here, plainly embraces but one subject both on its face and in its title. That one subject is the term of office of city attorney in cities of the first class. To effectuate the main purpose of this law prior statutory regulations inconsistent with that present purpose must necessarily be abrogated as is done by the repealing clause. In fixing the term for such an elective office there must necessarily be provision made for the election of some one to fill such office and such term, and such provision for an election is an integral part of the primary purpose of such law. All contained in said chapter, therefore, is germane to its stated purpose, and is plainly stated in the title, and therefore, even if such a law had been deemed a local one, it still would not have violated the above quoted provision of the constitution. *State ex rel. Ervin v. Vilas Co.* 163 Wis. 577, 582, 158 N. W. 338; *In re Southern Wis. P. Co.* 140 Wis. 245, 252, 122 N. W. 801. We are therefore convinced that said ch. 505 of the Laws of 1919 is a valid constitutional enactment.

That no other strictly municipal officer than city attorney is to be elected (disregarding for the present disposition of the case any question as to whether a justice of the peace or constable should be regarded as such "municipal officer") does not make the proposed election of April, 1922, any the less a "regular municipal election." The city attorney is a regular elective officer of such city (*State ex rel. Hamilton v. Krez,* 88 Wis. 135, 138, 59 N. W. 593); and the provision in said ch. 505 for the election of such a municipal officer at the expiration of a regular and for a new and complete term makes such election a "regular municipal election." Whether a city election is a "regular

municipal election" does not depend upon the number of regular municipal officers to be elected at such time: a provision for the election of one is as effective for such purpose as though there were to be a dozen elected.

The conclusion at which we have arrived as to the validity and effect of ch. 505 of the Laws of 1919 as discussed above makes it unnecessary to pass upon any of the other questions argued or raised in this case and we therefore express no opinion upon them.

By the Court.—Complaint dismissed.

CLEMENS, Plaintiff in error, vs. THE STATE, Defendant in error.

June 2, 1921—March 14, 1922.

Criminal law: Homicide: Credibility of witnesses: Question for jury: Negligence: Manslaughter: Culpable negligence: Violation of automobile statutes: Conviction based on improper statute: Trial: Verdict received in absence of defendant and counsel.

1. The evidence in a criminal case being in sharp conflict, it was a question for the jury to determine from all the evidence as to which side was telling the truth, which testimony it considered credible or otherwise and which it would believe, and having found a verdict it cannot be disturbed on appeal.
2. Ordinary negligence consists of a want of that care and prudence that the great majority of mankind exercise under the same or similar circumstances.
3. The defendant was properly convicted of manslaughter in the fourth degree, though he was not guilty of gross negligence, under secs. 4337, 4363, 4365, 4367, Stats., and a conviction was proper where the accused inadvertently ran into a stationary motor truck with an automobile while violating sub. 1, sec. 1636—52*a*, relating to lights on motor vehicles, and the statute relating to speed, the term "involuntary" signifying inadvertence, and the term "culpable negligence" not requiring gross negligence.

4. In a prosecution for manslaughter in the fourth degree, arising out of a violation of the statutes relating to lights on motor vehicles, a conviction was not reversed where both counsel and court were under the erroneous impression that sec. 1636—52, Stats. 1917, was in effect, instead of sub. 1, sec. 1636—52*a*, Stats. 1919, no exceptions having been taken to the instructions of the court nor proper instructions asked, and the Statutes of 1919 not being more favorable to the accused than the Statutes of 1917, and plaintiff in error having admitted that his headlights threw a light ahead not to exceed forty feet.
5. It was not reversible error to permit the jury to return a verdict in the absence of the accused and his counsel, where the court informed the accused and his counsel that if the jury reached a verdict before 9 or 10 o'clock that evening he would be in attendance to receive it, and the sheriff notified counsel for the accused by telephone when the jury was ready to return its verdict.

ERROR to review a judgment of the municipal court of Milwaukee county: CHESTER A. FOWLER, Acting Judge. *Affirmed.*

The case is stated in the opinion.

C. F. Rouiller, attorney, and *W. B. Rubin,* of counsel, both of Milwaukee, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Winfred C. Zabel,* district attorney of Milwaukee county, and *George A. Shaughnessy,* assistant district attorney, and oral argument by *Mr. Zabel* and *Mr. Shaughnessy.*

The following opinion was filed November 15, 1921:

DOERFLER, J. The plaintiff in error was convicted on the 1st day of April, 1920, of the crime of manslaughter in the fourth degree. The case was tried in the municipal court of Milwaukee county before the Hon. CHESTER A. FOWLER, judge presiding, and a jury, and the plaintiff in error was sentenced to serve a term of six months in the house of correction of Milwaukee county. A writ of error

was brought to review the conviction of the plaintiff in error on said charge.

On the 28th day of December, 1919, one Theodore Thomas and one William Logeman were returning from the country and were being conveyed in a Ford truck owned by Mr. Thomas along what is known as the Janesville plank road, running from Hales Corners, a small village located a distance of about ten miles southwest of the city of Milwaukee, in Milwaukee county, in a northeasterly direction, towards said city. Said Janesville plank road has located thereon a concrete strip eighteen feet in width in the center thereof, and on each side of said concrete strip there is a strip of dirt road about six feet in width. South of the dirt road a distance of about nine and one-half feet is a fence, and between the fence and the edge of the dirt road is a gully. Not far distant from Hales Corners, towards Milwaukee, on said plank road is a hill about three blocks in length, known as Kelly's Hill, sloping from the west towards the east, and the collision in question occurred a distance of about one half to one quarter of a mile northeast of the foot of Kelly's Hill, on a portion of the Janesville plank road which is practically level.

When Thomas, with his truck, arrived at the point of the collision, he stopped his car so that about one half thereof was located upon the south side of the cement road and one half thereof on the dirt road. The stop was made for the purpose of pouring water into the radiator, which had become greatly heated, and while Logeman, one of the occupants of the automobile truck, after having filled the radiator with cold water from a can which he took from the rear of the truck, had returned to the rear of the truck, and while facing the east, and while replacing the empty can on the rear of the truck, Thomas was located in front of the truck, engaged in cranking the same, and at this time the collision took place.

It also appears that *Clemens* was operating a Chandler five-passenger touring car and was accompanied on his trip by one Hobart.

The collision took place at about 5 o'clock in the afternoon, at a time when darkness had not yet fully set in, and the testimony shows that even without the aid of artificial light at that time a person could see a considerable distance, there being a dispute in the evidence, some of the witnesses claiming that the distance at which an object could be clearly seen at that time was not to exceed one hundred feet, and other witnesses testifying to a considerably greater distance.

Thomas had lit the lights on his automobile when he was about two miles from the place of the accident, and *Clemens* also claims that his lights had been lit while still some considerable distance from the place of the accident. *Clemens* and his witnesses testified that the Thomas car when it stopped had no tail light lit, while a number of witnesses for the state testified that the tail light was lit.

It is claimed by Logeman, a witness for the defendant in error, that when the *Clemens* car collided with the Thomas car it lifted up the rear end and forced it ahead for a distance of from twenty-five to thirty feet, and that the *Clemens* car ran an additional thirty-five to fifty feet beyond the place where the Thomas car stopped, so that in endeavoring to stop his car at the point of collision the plaintiff in error continued to run a distance of at least seventy feet before his car was stopped. Thomas was thrown under his truck, and on an examination it was ascertained that he was seriously hurt, and after being conveyed to a nearby saloon he died shortly after, during the same evening, as the result of pulmonary hemorrhage of the lung, caused by a fractured rib penetrating the same.

The witness Logeman, for the state, testified that the road was pretty good, but slippery in certain places; that he did not know whether the tail light on the Thomas car

was lit at the time of the collision. He heard no noise and no horn or signal, and did not see the *Clemens* car as it approached. That after the accident Mr. Hobart, who accompanied *Mr. Clemens* in his car, claimed that he was so blinded by the glaring headlight of the approaching car belonging to Mr. Mueller, coming from the east and going west, that he was unable to see the Thomas car.

J. C. Mueller, a witness for the state, testified that on the evening of the accident he drove a new Ford sedan from the city of Milwaukee out on the Janesville plank road towards Hales Corners; that at the time *Mr. Clemens'* car approached the Thomas car it was going at about thirty-five miles an hour; that the first he saw of the *Clemens* car was when it was at the top of Kelly's Hill, a distance of about one half a mile from where he then was. All he could see at that time were the lights on the front of the car; that at the time of the happening of the accident he was about 150 feet away from the place where it occurred; that he had put on the dimmers quite a distance before he reached the place where the accident occurred and at the time when he saw the *Clemens* car coming down the hill.

Mrs. William Loman, a witness for the state, testified that she was sitting in the rear seat of Mueller's automobile; that when she first saw the *Clemens* car coming down Kelly's Hill she made the remark to Mr. Mueller, "I would slow down; he is coming very fast." In her judgment the *Clemens* car was going at the rate of thirty-five miles an hour. She also testified that Mueller's dimmers were on, that the Mueller car was going between ten and fifteen miles an hour; that at the time she first saw the *Clemens* car the Mueller car was about three quarters of a mile from it, and she saw the *Clemens* car and the Thomas car at the same time. The *Clemens* car was going over twice as fast as the Mueller car.

Mr. Franklin J. Mueller, fourteen years of age, a witness for the state, testified that he was in the Mueller car,

and that he first noticed the Thomas car at a distance of about eight or nine blocks, and that at that time the *Clemens* car was over a mile away from where he then was; that Mr. Mueller, his father, turned on the dimmers of his car when he saw the *Clemens* car coming down the hill.

All of the witnesses for the state testified substantially that after the accident *Clemens* did everything in his power to aid and assist Thomas.

The plaintiff in error testified in his own behalf that he was forty-two years of age, a married man, and had been employed by the Chicago, Milwaukee & St. Paul Railroad Company for a period of two years and eight months; that he had never been arrested before; that he did not see the red light on the Thomas car, and that there was no red light burning on that car that night, either before or after the accident; that he had green shade lights on his car and that they were lit; that his headlight threw a light a distance of about thirty to forty feet; that he had never driven the car before with the headlights in that condition, although he knew they were in that condition that afternoon. He further testified that his car was going at the rate of fifteen miles an hour; that when the collision occurred the Thomas car was pushed ahead a distance of about twenty feet; that he did not see the Ford truck—it was too dark; that before the accident there was a car coming from the opposite direction from the city, and that he later found out that this was the Mueller car; that the dimmers on the Mueller car were not on, and that the glaring lights from the Mueller car blinded him; that when he approached the Mueller car he turned to the right on the road, slackened down the speed and put on the brakes, and that the reason he turned to the right was to permit the Mueller car to pass, and that at that time the collision took place.

Mr. Hobart, a witness for the plaintiff in error, testified that he was twenty-seven years of age, a traveling salesman, and accompanied *Mr. Clemens* in his car on the eve-

ning of the accident; that immediately before the accident *Clemens* was operating his car at the rate of between thirteen and sixteen miles an hour; that he did not see the Thomas car because his sight was blinded by the glaring headlights of the approaching Mueller car; that at the time the *Clemens* car was stopped it was about even with the Thomas car. At the time of the collision he could not see an object the size of a man in front of him a hundred feet away; that when *Mr. Clemens* saw the bright lights he slackened his speed and turned to the right of the road, and the next thing that the witness noticed was the collision.

The testimony thus detailed shows that there was a sharp conflict between the witnesses for the state and those of the plaintiff in error as to the speed of the *Clemens* car immediately prior to the happening of the accident, the state's witnesses having testified that such car was running at a rate of speed in excess of thirty miles an hour, and the witnesses for the plaintiff in error testifying that the *Clemens* car was running at a rate of speed not in excess of fifteen miles an hour. The witnesses for the state testified that the Mueller car had, a considerable distance before it reached the Thomas car, its glaring headlights shut off, and that the dimmers thereof were turned on. On the other hand, the witnesses for the plaintiff in error testified that the dimmers on the Mueller car, immediately preceding the accident, had not been turned on, and that the Mueller car had its glaring headlights burning, and that by reason of such glare *Clemens* was unable to see the Thomas car so as to avoid the happening of the collision.

The witnesses for the state further testified that when the *Clemens* car collided with the Thomas car it pushed it a distance of about thirty-five feet, and that the *Clemens* car ran an additional thirty-five feet before it was brought to a stop. The witnesses for the plaintiff in error testified that the *Clemens* car pushed the Thomas car a distance of about twenty feet, while Hobart testified that when the

Clemens car was stopped it was about even with the Thomas car.

Upon this state of the evidence, there being a sharp conflict on these various disputes, it became a question for the jury to determine from all the evidence in the case, and from the surrounding facts and circumstances, as to which side was telling the truth, and which testimony it considered credible or otherwise, and which it would believe. The issues on the questions of fact thus presented having been submitted to the jury and having been found in favor of the state, the verdict cannot now, under the repeated decisions of this court, be disturbed. *Birmingham v. State,* 145 Wis. 90, 129 N. W. 670; *Van Haltren v. State,* 142 Wis. 143, 124 N. W. 1039; *Imperio v. State,* 153 Wis. 455, 141 N. W. 241.

Counsel for plaintiff in error, in their assignments of error, claimed:

1. That the court erred in its instructions to the jury on manslaughter in the fourth degree.

2. In refusing to grant the instructions requested by the plaintiff in error.

3. In refusing to grant the plea in bar of plaintiff in error.

4. In failing to set aside the verdict of the jury because it was contrary to law and the weight of the evidence.

5. In permitting the jury to return a verdict in the absence of plaintiff in error and his counsel.

The first four assignments can properly be considered together, as they involve the correctness of the charge of the court and the view that the court took in the matter with respect to what constitutes manslaughter in the fourth degree under our statutes.

The court instructed the jury in part as follows:

"That the defendant's act was committed by accident and misfortune and without any unlawful intent within the meaning of this statute is manifest. It remains, however, to determine whether the act involved, resulting in the death,

was a lawful act, and, if it was lawful, whether it was done with usual and ordinary caution.

"The act of the defendant which is involved is the driving of the automobile when it struck the other automobile. If he was driving the automobile in violation of any provision of the statute regulating the driving of automobiles, and so driving resulted in the death, his act was not a lawful act.

"The statute regulating the use of automobiles provides, among other things, that no person shall drive an automobile on any highway at a speed in excess of thirty miles an hour; that where for any cause the view in the direction in which the automobile is proceeding shall be obstructed the speed shall be reduced to such a rate as will tend to avoid danger of accident; that from thirty minutes after sunset until thirty minutes before sunrise there shall be displayed on the front of every automobile while being driven on any highway at least one lamp giving a reasonably bright light in the direction in which the automobile is going; that it shall be unlawful for any person to drive an automobile on any highway at such a rate of speed that it cannot be brought to a complete stop within the distance ahead that the driver can with the aid of the lights thereon, in connection with the light from other sources, see an object the size of a person, and that no intoxicated person shall drive an automobile on any highway.

"If, therefore, the defendant was driving his automobile in excess of thirty miles an hour; or, if his view ahead was obstructed by darkness or by the glare from the headlights of the approaching car, and his speed was not reduced to such a rate as would tend to avoid danger of accident; or, if it was thirty minutes after sunset and he did not have a reasonably bright light on the front of his automobile; or, if he was driving at such a rate of speed that he could not bring his car to a full stop within the distance that he could see an object ahead of his car the size of a man; or, if the defendant was at the time intoxicated,—in any such event the defendant's act was unlawful, and he is guilty of manslaughter, if the violation caused the death.

"Should it not appear that the defendant was violating the statute regulating the use of automobiles, it does not necessarily follow that the homicide was excusable. If the

defendant was not violating this statute, but was not driving with usual and ordinary caution in other respects, and such want of care caused the death, the homicide was not excusable."

In this connection, in order to clearly present the contention of counsel for plaintiff in error with respect to the view taken by them as to the construction of the statutes involving manslaughter in the fourth degree, a few of their requested instructions may properly be set forth. Counsel for the plaintiff in error requested the court to instruct the jury, among other things, as follows:

"You are instructed that by the term 'criminal negligence,' as used in these instructions, is meant not simply such negligence as might be the foundation of a suit for damages by the person injured thereby, but something more than that. Negligence to become criminal must be reckless, wanton, and of such a character as shows an utter disregard of the safety of others under the circumstances, likely to cause injury.

"You are further instructed that unless you believe from all the evidence, beyond a reasonable doubt, that the defendant was guilty of criminal negligence, as defined in these instructions, and that Thomas was killed as the direct result of such criminal negligence, you should find the defendant not guilty."

There were other requested instructions upon the same subject, which, together with the requested instructions herein set forth, were refused by the court and not included in its instructions to the jury. Inasmuch as the other requested instructions not herein set forth were of a nature and import similar to the ones herein detailed, the same are herein omitted.

It therefore becomes evident that, in accordance with the views expressed by the trial court in its instructions, the failure to exercise ordinary care, if death results therefrom, warrants a conviction for manslaughter in the fourth degree. On the contrary, it was strenuously argued by coun-

sel for plaintiff in error, both on the oral argument and in their brief, that the degree of negligence contemplated by the provisions of the statutes on manslaughter in the fourth degree is not ordinary negligence but gross negligence. It may further be said that the evidence in this case, if it discloses negligence at all, refers to only such negligence as the plaintiff in error was guilty of in violating the provisions above set forth pertaining to the operation of automobiles upon the public highways of this state.

We consider the question involved a new one in this state, of far reaching importance to the citizens of the state, and have therefore carefully examined the law with respect to the contentions of both of the parties interested, and have arrived at the conclusion herein set forth after a painstaking review of the statutes, not only of this state but of other states, and the decisions applicable thereto construing such statutes.

Ordinary negligence, as defined by this court, consists of a want of that care and prudence that the great mass of mankind exercises under the same or similar circumstances. *Dahinden v. Milwaukee E. R. & L. Co.* 169 Wis. 1, 171 N. W. 669; *Astin v. C., M. & St. P. R. Co.* 143 Wis. 477, 128 N. W. 265.

It is held in *Jorgenson v. C. & N. W. R. Co.* 153 Wis. 108, 116, 140 N. W. 1088, that:

"Gross negligence has received a very certain and definite meaning in the jurisprudence of this state, somewhat different from the meaning given to it in other states. It is not inadvertence in any degree; there must be present either wilful intent to injure or that wanton and reckless disregard of the rights of others and the consequences of the act to himself as well as to others which the law deems equivalent to an intent to injure." *Willard v. C. & N. W. R. Co.* 150 Wis. 234, 136 N. W. 646.

The trial judge clearly defined his position in this case as to whether the negligence involved in the case con-

stituted ordinary or gross negligence, and made a statement in the record for that express purpose. Among other things he said:

"I think that the evidence shows, beyond a reasonable doubt, that at the time the defendant ran into the truck he was violating some provisions of the statutes regulating the use of automobiles. For instance, it seems very clear that he was driving without a reasonably bright headlight, and that he was driving so fast that he could not bring his car to a complete stop within the distance that he could see an object the size of a man ahead of his car, with the aid of his own headlights and such other light as was at the time present. These provisions were enacted for the protection of the public. They are criminal statutes. One who runs an automobile in conscious disregard of them, without intent to do injury or knowledge that any person is in a position of danger, is doubtless guilty of nothing more than ordinary negligence, as distinguished from gross negligence. There is, however, a degree of culpability not present when the negligence resulting in death is not a violation of any statute enacted for the public safety. But my view is that ordinary negligence, where no statutory safety regulation is violated, is clearly manslaughter in the fourth degree under our statutes."

Under the statement made by the learned trial judge the accident was not the result of gross negligence, and gross negligence was not involved in the case. The negligence that is referred to under the automobile statutes, and involving a violation of such statutes, according to the statement so made, is nothing more than ordinary negligence; but a distinction appears to be drawn between an act which involves a violation of these statutes and ordinary negligence which does not involve a violation of such statutes. Any form of ordinary negligence, where death results, according to the statement of the trial judge, is sufficient to warrant a conviction under the fourth-degree manslaughter statute of our state. By this, however, it was not intended by the trial court to convey the thought that a violation of

the statutes regulating the operation of automobiles upon the highways could not constitute gross negligence, for it can readily be seen that the driving of an automobile at a grossly excessive rate of speed, in violation of the statutes, may constitute an act so wanton and reckless as to evince an utter disregard for the safety of others and to necessarily imply an intent to injure.

A well defined distinction was therefore drawn by this court in *Ludke v. Burck,* 160 Wis. 440, 152 N. W. 190, between the case of *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84, and the *Ludke Case.* In the *Pinoza Case* it was expressly held that where a violation of a statute designed to protect persons against bodily injuries is made a criminal offense, such a violation should be classed with gross negligence. It is said in the *Ludke Case,* referring to the statutes involved in the *Pinoza Case,* that

"These cases dealt with statutes prohibiting the sale of firearms and the employment of minors under sixteen years of age in certain specified employments. The doctrine of these and similar cases is that the violation of these statutes is of such gravity that public policy requires, in the interest of protecting life and limb, that persons violating them be held to strict accountability for the consequences flowing therefrom, regardless of the fault of the injured person, and therefore the persons violating them and thereby producing personal injuries to another were to be treated as guilty of wilfully injuring another as a matter of law."

In the *Ludke Case* the Chief Justice in his opinion raises the question as to whether the doctrine laid down in the *Pinoza Case* applies to cases where statutes prohibit something innocent in itself but made unlawful, and violation thereof penalized to compel a higher standard of care as regards persons and property. In the opinion last referred to, a violation of the automobile statutes is placed in the latter category.

It was not held in the *Ludke Case* that a violation of the automobile statutes may not be of such a nature as to con-

stitute gross negligence, but it was held in substance that such violation may amount to mere inadvertence or to gross negligence, depending upon the facts in the particular case. It was also held that a violation of a statute like the automobile statute was negligence *per se,* but not necessarily actionable negligence. As a conclusion in the *Ludke Case* the court holds that the issue raised as to whether the act constitutes ordinary or gross negligence presents a proper issue for the jury to determine upon the evidence, facts, and circumstances disclosed in the case.

We now come to an examination of the statutes pertaining to manslaughter applicable to the instant case. Sec. 4337 of the Statutes provides:

"The killing of a human being, without the authority of law, by poison, shooting, stabbing or any other means or in any other manner is either murder, manslaughter or excusable or justifiable homicide, according to the facts and circumstances of each case."

Sec. 4365 of the Statutes provides:

"The killing of a human being by the act, procurement or omission of another in cases where such killing shall not be murder according to the provisions of this chapter is either justifiable or excusable homicide or manslaughter."

Sec. 4363 of the Statutes provides:

"Every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree."

Sec. 4367 of the Statutes provides:

"Such homicide is excusable when committed by accident and misfortune in lawfully correcting a child or servant, or in doing any other lawful act by lawful means with usual and ordinary caution and without any unlawful intent," etc.

In no event could the act complained of be considered as

justifiable homicide, and such was conceded on the trial by counsel for plaintiff in error. Therefore, the matter resolves itself to a determination as to whether or not it was excusable homicide. It was held by the trial court that the act committed was the result of accident and misfortune, and that the act in itself was a lawful act and was committed without any unlawful intent. With such conclusion of the trial court we readily agree.

There is, therefore, then presented to us for determination the question whether or not the act was committed with usual and ordinary caution. As already stated, the elements of usual and ordinary caution in the performance of an act are essential constituents involved in the definition of ordinary care, and under such definition the failure to perform such lawful act with usual and ordinary care as the great mass of mankind exercises under the same or similar circumstances constitutes negligence.

The fourth-degree manslaughter statute applicable to this case embraces in its provision every killing of a human being by the act, procurement, or culpable negligence of another where such killing is not justifiable or excusable or is not declared to be murder or manslaughter of some other degree. A correct interpretation of this statute, therefore, involves primarily the intention of the legislature in the use of the word "culpable" negligence therein, it being contended by counsel for the plaintiff in error that such term necessarily implies gross negligence as above defined, while counsel for the state insist that such term as so used in this statute implies and means nothing further than ordinary negligence as herein defined.

"'Culpable negligence' is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under the circumstances surrounding the particular case." *Newman v. Luther*, 119 App. Div. 701, 703, 104 N. Y. Supp. 684, 685 (quoting and adopting definition in 2 Words & Phrases, 1780).

See, also, *Hot Springs R. Co. v. Newman,* 36 Ark. 607, 611; *Sikes v. Sheldon,* 58 Iowa, 744, 13 N. W. 53, 54; *St. Louis, I. M. & S. R. Co. v. Bragg,* 66 Ark. 248, 50 S. W. 273, 274; *Woodman v. Nottingham,* 49 N. H. 387, 392, 6 Am. Rep. 526; *People v. Buddensieck,* 4 N. Y. Crim. Rep. 230, 1 N. Y. St. Rep. 436, affirmed 103 N. Y. 487, 9 N. E. 44; *Montgomery v. Scott,* 10 S. C. 449, 451; *State v. Emery,* 78 Mo. 77, 80; *State v. Horner,* 266 Mo. 109, 180 S. W. 873.

In *Johnson v. State,* 129 Wis. 146, 157, 108 N. W. 55, Mr. Justice MARSHALL, in rendering the opinion of the court, said that:

"Manslaughter in the third degree is defined as the killing of a human being in the heat of passion without a design to effect death, etc., while manslaughter in the fourth degree is defined to be an involuntary killing of a human being in the heat of passion, etc. The term 'involuntary' signifies inadvertence."

We therefore have authority in this state that the statute pertaining to manslaughter in the fourth degree is held to be an involuntary killing, and that the term "involuntary" signifies inadvertence. "Inadvertence," as defined in Webster's dictionary, means "Lack of heedfulness or attentiveness; inattention; negligence."

Both the *Johnson Case* and the definition referred to clearly indicate that the trial court was right in his statement that one can be held for manslaughter in the fourth degree even though the killing is involuntary and is due to inadvertence.

In the case of *Bliss v. State,* 117 Wis. 596, 94 N. W. 325, where the death was the result of an explosion of a lighted kerosene lamp, which explosion, the state contended, was caused by the act of the plaintiff in error, and in which it was contended by the plaintiff in error that the deceased was in the act of throwing at him such lighted kerosene lamp, and where the plaintiff in error claimed that he accidentally

struck the lamp while throwing up his hands, under the supposition that the deceased was about to strike him with it, the court held that, if the contention of the plaintiff in error was correct, then such contention constituted an adequate defense to the action; but that if, as a matter of fact, the plaintiff in error in raising his cane was not justified in supposing that the deceased was about to throw at him such lighted kerosene lamp, then he was guilty of manslaughter in the fourth degree. It would appear that no more apt case illustrating the doctrines contended for herein by the state could be produced in justification of their contentions, for it becomes clear that if in the *Bliss Case* the plaintiff in error could be convicted of manslaughter in the fourth degree by the doing of an act which appeared to him at the time necessary for his own protection, but which act as a matter of fact was not justifiable for the reason that he was mistaken as to what appeared to him as an act of violence on the part of the deceased towards him, then the proper statute applicable to the offense of which he was guilty is manslaughter in the fourth degree. Such act, under the construction of the court in the *Bliss Case,* was nothing more than inadvertence or negligence.

In Missouri there is but one degree of manslaughter, which, under the provisions of sec. 3236 of the statutes of that state, is defined as follows:

"Sec. 3236. *Manslaughter.* Every killing of a human being by the act, procurement or culpable negligence of another, not herein declared to be murder or excusable or justifiable homicide, shall be deemed manslaughter."

The Missouri statute is therefore almost *verbatim* like the fourth-degree manslaughter statute of the state of Wisconsin.

Excusable homicide under the Missouri statute, as defined by sec. 3234 of the statutes of that state, is as follows:

"Sec. 3234. *Excusable homicide.* Homicide shall be deemed excusable when committed by accident or misfor-

tune, in either of the following cases: First, in lawfully correcting a child, apprentice or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without unlawful intent," etc.

The Missouri statute on excusable homicide, therefore, is also almost *verbatim* like the Wisconsin statute upon the same subject.

In *State v. Horner,* 266 Mo. 109, 180 S. W. 873, in which the defendant was charged with manslaughter, based upon the culpable negligence of defendant in operating an automobile over the public streets of the city of St. Louis in such a manner as to run down and kill one Cooper, the court in its opinion says:

"The instructions given by the court to the jury defined the term 'culpable negligence' as the failure to exercise the 'highest degree of care which a very prudent and ordinary skilful driver of an automobile would have used under the same or similar circumstances.' "

The supreme court of Missouri in its decision held such instruction clearly erroneous, and said:

"It is true that the act of 1911 (Laws 1911, pp. 330, 331) makes the 'owner, operator or person in control of an automobile' respond in civil damages for any injury resulting from the failure to use 'the highest degree of care' as by said act defined, but said act has reference only to civil actions, and is in no sense to be considered a part of the criminal code, and, therefore, has no part in fixing the standard of care required in measuring criminal responsibility."

The term "culpable negligence," as used in the statute of Missouri as above stated, was defined by the supreme court of Missouri as follows:

"Culpable negligence is the omission to do something which a reasonable, prudent, and honest man would do, or the doing something which such a man would not do under all the circumstances surrounding each particular case." *State v. Emery,* 78 Mo. 77; Wharton, Homicide (3d ed.) § 445; 3 Greenleaf, Evidence (16th ed.) § 129; Kelley,

Criminal Law & Prac. (3d ed.) § 511, p. 454; *State v. Coulter* (Mo.) 204 S. W. 5.

It was also held in *State v. Becker,* 9 Houst. (Del.) 411, 33 Atl. 178, that, if there be any negligence, or want of proper care, in the action of a person from which death results, the death cannot be said to be purely accidental; it is the consequence of such negligence or want of proper care, and criminal liability attaches. *State v. Morgan,* 40 S. C. 345, 18 S. E. 937; *Bertrong v. State,* 2 Tex. App. 160.

In Michigan, Connecticut, and Illinois, and in other states where a different rule prevails than in Missouri, the common law obtains with respect to the crime of manslaughter, or statutes have been enacted which substantially and materially differ in their wording from the statutes of either Missouri or Wisconsin, and therefore the doctrine requiring a degree of culpability amounting to criminal negligence has been declared in those states. In Ohio, in order to convict of manslaughter, the act must be an unlawful act, which has been construed by the supreme court of Ohio as being one in violation of some penal statute, as it was declared by that court that the common law is not applicable in such state.

There is no escape, therefore, from the view that the trial court in this case presented in its instructions, and we are therefore necessarily constrained to adopt such view.

In examining the automobile statutes applicable to the case at bar we find that counsel on both sides of the case and the trial court were under the impression that the Statutes of 1917 were in force and applicable to the case, whereas at the time the accident happened the Statutes of 1919 had been adopted and published and were in full force and effect. As to the speed-rule limit outside of incorporated cities and villages in this state, the maximum speed was properly set forth in the instructions in accordance with the 1919 Statutes.

Sec. 1636—52*a* of the 1919 Statutes provides:

"1. From thirty minutes after sunset until thirty minutes before sunrise, no automobile, motorcycle or other similar motor vehicle shall be driven upon or occupy any public highway in this state unless such vehicle is provided with sufficient lights, of such design and so adjusted and operated as to render the use of the highway by such vehicle safe for all the public.

"2. The minimum requirements for head lamps on any automobile or other similar motor vehicle except motorcycles, while being driven upon the highway, shall be such as to enable the driver to clearly distinguish a person, vehicle or other substantial object two hundred feet ahead, and the design, adjustment and operation of such head lamps shall be such as to avoid dangerous glare or dazzle."

Sec. 1636—52 of the 1917 Statutes, under which the trial court in part instructed the jury, provides:

"From thirty minutes after sunset until thirty minutes before sunrise there shall be displayed on the front of every automobile or other similar motor vehicle, while being operated or driven along or upon any public highway of this state, at least one lamp giving a reasonably bright light in the direction in which said automobile or other similar motor vehicle is going, . . . and it shall be unlawful for any person to operate or drive any automobile, . . . along or upon any public highway of this state at such a rate of speed that such automobile, motorcycle or other similar motor vehicle cannot be brought to a complete stop within the distance ahead that the driver or operator thereof can, with the aid of the lights thereon, in connection with the lights from other sources, see an object the size of a person."

An examination of these two statutes makes it manifest that under the 1917 Statutes it shall be unlawful for any person to operate or drive any automobile, etc., along or upon any public highway of this state at such a rate of speed that such automobile, etc., cannot be brought to a complete stop within the distance ahead that the driver or

operator thereof can, with the aid of the lights thereon, in connection with the lights from other sources, see an object the size of a person; while in the Statutes of 1919 the operator must provide his automobile with sufficient lights, of such design, etc., as to render the use of the highway by such vehicle safe for all the public, such lights to be of such a design as to enable the driver to clearly distinguish a person, vehicle, or other substantial object 200 feet ahead.

A careful reading of these two sets of statutes on the subject of lights also, as it appears to us, makes it clear that the 1919 Statutes are not more favorable to plaintiff in error than the Statutes of 1917, and under both statutes the operator of an automobile is required to so operate his machine as to avoid danger and injury to persons upon the highway.

No exceptions, however, to the instructions of the trial court with respect to differences in the 1917 and 1919 Statutes having been taken and incorporated in the record, and not being a part of the bill of exceptions, and no error having been based upon the failure of the court to properly instruct in that regard, and no proper instructions in that respect having been requested by the plaintiff in error or his counsel, we do not feel it incumbent, under the circumstances of the case, to consider seriously the mistake that was so made. Being required to operate his machine on the public highway, by the provisions of the Statutes of 1919, at such a rate of speed as to avoid danger of injury, and the plaintiff in error having admitted that he had a headlight upon his machine which threw a light ahead not to exceed forty feet, and it appearing also to us clearly that the plaintiff in error did not operate his machine, under the existing circumstances, so as to avoid injury, we cannot see how we can disturb the verdict.

We are not aware of any previous prosecution in this state under the fourth-degree manslaughter statute where a defendant was proceeded against upon a charge of man-

slaughter where death resulted from the performance of a lawful act by lawful means but not with usual and ordinary care; on the contrary, we are of the opinion that the doctrine was quite generally accepted by the courts and the profession that the term "culpable negligence," as used in the statute under consideration, involved something more than the elements of ordinary negligence. The wording of the statute, however, is plain and unambiguous, and we must therefore interpret such meaning in the light of the clear language used.

It must also be apparent to every one who has given the subject any thought that the interpretation contended for by the state has been directed to our attention by reason of the numerous deaths which have resulted from a violation of the provisions of the statutes pertaining to the operation of automobiles upon the public highways. In the instant case the trial judge in effect pronounced the manslaughter statute in question, as interpreted by him, a reasonable statute, and one which, if enforced, will have a tendency in a large measure to reduce the numerous injuries inflicted by the use of the automobile. This conclusion of the trial judge may be deemed correct by some and incorrect by others.

Our commercial and industrial life has, since the adoption of these statutes, become so complex and intricate that it has engaged and is engaging our mental efforts in an ever-increasing degree; in other words, our minds are absorbed with the great problems that confront us in the pursuit of the avocations which we have chosen for a livelihood. This fact in itself is largely responsible, as we view it, for the numerous injuries that result from inadvertence. The automobile itself is a complex and intricate piece of mechanism. The machinery and appliances used in industry have changed their nature from the simple and primitive form which existed at the time of the adoption of these statutes. In almost every avenue of life danger to life and

injury to limb stares us in the face. The ownership and use of automobiles has increased during the period of twenty years incredibly, and the ownership of such an instrumentality is no longer considered as a luxury but as a necessity. Automobiles are no longer exclusively used for pleasure, but have become a necessity in business. Automotive power competes today with the public utilities like the street cars and the railroads, both in the carrying of passengers and freight. It is estimated that one out of every ten of the inhabitants of this state is the owner of an automobile, and what was predicted less than a quarter of a century ago, that automobiles would supplant the use of the horse in the operation of vehicles, is now a well-known reality. These facts have received proper recognition by the state and the local communities, and as the result thereof modern and improved highways have been built in all portions thereof, and extending from one end of the state to the other, all designed to accommodate the new order of things. In large cities, where the population is congested, thousands and thousands of automobiles travel at a rapid rate of speed along the highways and the thoroughfares; and on the main arteries of travel in the country, and particularly on such highways as connect large urban populations, a similar situation exists. The motor vehicle in itself is a powerful engine, propelled upon the highways of the state where people have a right to and do travel, and the operation thereof must necessarily be connected with great danger.

And so, in the course of time, there has developed a situation which has resulted in an appalling loss of human life and great injury to limb. Such results, however, are the natural and, to a large extent, inevitable consequences of the use to which these instrumentalities are put. We are inclined to view the situation too much from the standpoint of the pessimist and to overlook the really bright sides of the matter, which to a large extent counterbalance the dark

sides and act as a compensating influence for the necessary evils which result. The busy lawyer, under the law as we have now construed it, whose mind during the day has been absorbed in the consideration of the intricate problems that have been presented to him in the course of his professional activities during the day, and who by reason thereof is unable wholly to relieve himself of his absorbing thoughts, who, in an effort to regain a well-deserved relaxation at the end of his day's labor, in taking out his family for an automobile ride, exceeds the prescribed speed limit in the slightest degree, and as the result thereof a collision takes place which unfortunately causes the death of a human being, will be subject to a homicidal charge and a conviction thereof, which not only will be ruinous to his own happiness and welfare, but reflect seriously upon the members of his family. The laborer employed in the construction of a large building, who while absorbed in the performance of his duties, or whose mind may incidentally be engaged in pondering over serious matters of domestic trouble and difficulty, inadvertently may drop some tool or an article of building material, as the result of which a human life may be lost. The result is that he has changed his status from a law-abiding citizen to that of a felon, and if he be endowed with the conscientious regard and appreciation which all good citizens should possess, namely, that of retaining his good name and reputation in the community where he resides, he must be keenly affected by the results wrought and the consequence of what can be termed nothing more than his misfortune. While the freedom from physical injury and the full possession of our physical and mental powers are most desirable, and while life itself is one of the dearest possessions with which man is blessed, the true citizen esteems his good name and his reputation of infinitely greater importance than either life or limb.

We have indulged in these comments merely to make it clear that we are not heartily in accord with the purport of

the manslaughter statute in question, with the thought that at the earliest time available such changes be made in the statutes of our state by the legislature as will require, in order to convict of manslaughter in the fourth degree, gross negligence as defined in the decisions of this court, or that provision be made so that no one will come within the condemnation of this statute unless he is guilty of an act in violation of some penal law, as the result whereof human life is taken.

However, we must construe the statutes before us in the light of their clear import and meaning, and we have done so.

Counsel for the plaintiff in error contend that the court erred in permitting the jury to return the verdict in the absence of the plaintiff in error and his counsel. It has been repeatedly held that a verdict should not be received in the absence of the accused and his counsel unless the right of accused to be present in person and to have counsel present is waived.

At the time the jury retired the accused and his counsel were informed by the trial judge that in case the jury reached a verdict before 9 or 10 o'clock that evening he would be in attendance to receive it. Upon the jurors' announcing to the court their readiness to return a verdict the deputy sheriff telephoned to the office of counsel for the accused and left word that the jury was ready to return its verdict and that the verdict would be shortly received, and that if the accused and his counsel wished to be present it would be necessary for them to immediately come over to the court room. This was at approximately 8:45 p. m. It appears from the affidavits that the office of the attorneys for the accused was but a few blocks distant from the court room. The court waited about fifteen minutes for counsel and the accused to appear, and, not having appeared, the verdict was received. Both the accused and his counsel were vitally interested in this verdict, and both

had received due notice of the agreement of the jury and the readiness of the court to receive the verdict. It would be unfair, under the circumstances, to expect the court to wait an unreasonable length of time. Both the accused and counsel absented themselves voluntarily, and we are therefore of the opinion that the right of the accused and his counsel to be present at the time of the reception of the verdict and the right to poll the jury, under the decisions of this court in *Stoddard v. State,* 132 Wis. 520, 112 N. W. 453, and *Hill v. State,* 17 Wis. 675, was waived.

The judgment and sentence of the lower court is therefore affirmed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on March 14, 1922.

SLIVICK, Respondent, vs. AMERICAN EXPRESS COMPANY, Appellant.

December 13, 1921—March 14, 1922.

Contracts: Agreement to transmit money: Breach: Receipt of express company: Parol testimony to explain.

1. Desiring the transmission and delivery of 4,000 rubles to his parents in Russia within a certain date, plaintiff paid the defendant express company $1,000 for that purpose, which issued to him a receipt therefor. In an action to recover back the money, the evidence is *held* to establish an agreement, and default, on the part of the company to make delivery of the rubles within such date, entitling plaintiff to recover.
2. A receipt for money issued by an express company being entirely silent as to what is to be done with the money, or the purpose for which the payment is made, does not constitute a written contract so as to render inadmissible parol testimony to show what the real contract was.
3. The refusal of the trial court to submit to the jury the question of whether the remittance was in fact delivered to and retained by the remittee, even though not delivered within

the time stipulated, is *held* not error, where the company did not pretend throughout the trial that it made delivery of the remittance or that it had been received by the remittee, and, in fact, supplied proof that the remittance had not been received.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

On the 29th day of June, 1917, plaintiff desired to transmit 4,000 rubles to his mother, at Simferopol, Russia, to be delivered to her within ten days from that date. For that purpose he paid $1,000 to the *American Express Company* at Milwaukee and the company issued to him a receipt, in words and figures as follows:

"American Express Co. (619. October, 1911) Office Milwaukee. State Wis. June 29, 1917. Received of Hyman Slivick 4,000 Rubles on Money Order Settlement $1,000. Settled by On Light—Water Bill Settlement. Total $1,000. B. Schoenkerman. Rem. No. 5989692. Receipt No. ——. American Express Company, per D. P. McGowan, Asm."

This action was commenced in the civil court of Milwaukee county to recover the $1,000, it being claimed by the plaintiff that the defendant breached its contract by failing to deliver the money at Simferopol, Russia, within ten days as agreed. The case was tried before a jury, and the following special verdict was returned: (1) that the *American Express Company* agreed to transmit 4,000 rubles to the address given at Simferopol, Russia, within ten days from June 29, 1917; (2) that the *American Express Company* agreed to pay back $1,000 in American money to the plaintiff in case it did not deliver 4,000 rubles at the address given by the plaintiff within ten days from June 29, 1917. Upon this verdict judgment was rendered in favor of the plaintiff, which was affirmed upon appeal to the circuit court. From the judgment of the circuit court affirming the judgment of the civil court defendant brings this appeal.

For the appellant there was a brief by *Miller, Mack &*

Fairchild of Milwaukee, attorneys, and *Carter, Ledyard & Milburn* of New York City, of counsel, and oral argument by *Paul R. Newcomb* of Milwaukee.

For the respondent the cause was submitted on the brief of *Joseph A. Padway,* attorney, and *A. W. Richter,* of counsel, both of Milwaukee.

The following opinion was filed January 10, 1922:

OWEN, J. There is no claim on the part of the defendant that the money was delivered to plaintiff's mother at Simferopol, Russia, within ten days from the date of the remittance. The usual course of remittances of this nature was as follows: the remittance would go forward from Milwaukee to the office of the express company at New York by mail; upon its receipt the express company would buy 4,000 rubles on the market; it would then telegraph its correspondent at Petrograd to deposit in the Russian mails a remittance for the 4,000 rubles, addressed to the remittee. The evidence discloses that the remittance was not deposited in the Russian postoffice until August 1st, so that it appears conclusively that the remittance could not have reached the remittee within ten days from the date when the money was paid to the express company. This conceded fact, together with the special verdict, establish that the express company agreed to transmit 4,000 rubles to plaintiff's mother at Simferopol, Russia, within ten days from June 29, 1917; that it agreed to pay back $1,000 in American money to plaintiff in case it did not deliver the 4,000 rubles as agreed; that it failed to make such delivery, and that it has failed to return the money, which is also a conceded fact in the case. If the verdict of the jury is supported by competent evidence, the plaintiff's right to a recovery is therefore established.

The only written contract between the parties consists of the receipt which was issued by the express company to the plaintiff, set forth in the statement of facts. That

this constitutes a written contract is not seriously contended by the appellant. It is nothing more than a receipt for $1,000 which the plaintiff delivered to the express company, and is entirely silent as to what is to be done with the money or the purpose for which the payment was made. It is too well settled to require the citation of authority that a receipt of this nature does not constitute a written contract so as to render inadmissible parol testimony to show what the real contract was.

The plaintiff's brother testified that he and plaintiff lived together in Milwaukee; that they desired to send 4,000 rubles to their parents in Russia; that on the 20th day of June the witness and the plaintiff went to the office of the *American Express Company* and talked with the agent about sending money to Russia; "they told him they got a letter that their parents want money by the 14th of July; they told him that the money had to be there on the 14th of July; the agent told them he would let them know in a couple of days." Witness again visited the express company on the 29th of June and "told him they need money on the 14th of July, and told him, can you send money to Simferopol, Russia, on the 14th of July and the agent told him that they would deliver the money in Simferopol in from three to ten days, and that he would have a telegram in Milwaukee showing that the money had been so delivered." The agent told the witness that he would show him a telegram that they had received the money within ten days or he would pay back the $1,000.

One B. F. Schoenkerman was a branch agent in Milwaukee of the *American Express Company* in the matter of handling domestic money orders. He also handled foreign remittances, but not as an agent of the express company. With reference to that line of business he represented only his customer. He discovered that the plaintiff wanted to send this money to Russia, and called on him on the 29th of June and solicited his business, with the re-

sult that plaintiff and Schoenkerman went to the office of the express company, paid the $1,000 to be remitted, and took the receipt already mentioned. We then have the following negotiations: on the 20th of June the two brothers called on the agent of the express company, stated to him that they wanted to send some money to their parents in Russia, and that it must be there by the 14th of July, for the purpose of ascertaining whether the express company could so deliver the money. The agent informed them that he would let them know in a couple of days. On the 28th of June the plaintiff's brother called, and was informed by the agent that the company would undertake to deliver the money at Simferopol, Russia, within from three to ten days, and that if it did not exhibit to him an official telegram showing that the money was so delivered within ten days from the date of remittance the company would pay back the $1,000. The next day the money was paid to the express company for remittance.

This constituted a continuous negotiation culminating in the undertaking of the express company to make the remittance within from three to ten days, and to pay back the money if the express company failed to deliver according to its agreement. It is true that there was nothing said at the time of the actual delivery of the money with reference to the time within which the remittance was to be delivered. However, the inference that the money was delivered to and received by the express company pursuant to the promise and agreement made by the agent on the day previous is entirely justified. This was the very remittance to which the prior negotiations related, and it seems clear that the contract between the parties is to be determined in the light of the negotiations which took place on the 20th, the 28th, and 29th of June.

It is true that the testimony on behalf of the plaintiff is flatly contradicted by the agent of the express company, and we are asked to set aside the verdict of the jury on the ground that the evidence upon which it rests is incredible.

We are asked to consider the state of affairs existing in Russia at that time by reason of the world war, and to declare that such an undertaking on the part of the express company is against all reasonable probability. Without considering the question of how far we may go in taking judicial notice of conditions in Russia which would interfere with the prompt transmittal of the remittance, although confessing some doubt that the company would undertake the remittance within the time stipulated, we are not disposed to say that such an undertaking is so improbable as to make incredible the evidence supporting the verdict. It seems just as improbable that the company would accept this money, give its receipt therefor and undertake the remittance without expressly stipulating that it did not undertake to do so within any given time, or in any manner limiting its liability in case of extraordinary delay, as was done in *Alemian v. American Express Co.* 237 Mass. 580, 130 N. E. 253, and *Katcher v. American Express Co.* (N. J.) 109 Atl. 741, where the liability of the company was expressly limited by the contracts of remittance. Furthermore, it appears that the remittance was not deposited in the Russian mails for more than a month after the money was paid, and we are not prepared to say that this delay was due to war conditions.

Appellant assigns as error the refusal of the trial court to submit to the jury the question of whether the remittance was in fact delivered to and retained by the remittee, even though not delivered within the time stipulated. It is true that it was incumbent on the plaintiff to prove this fact. However, whether the money was so delivered was peculiarly within the knowledge of the company. Under the circumstances, slight proof of this fact on the part of the plaintiff should be sufficient to relieve him of the burden. The express company did not pretend, throughout the trial, that it made delivery of the remittance or that it had been received by the plaintiff's mother, and, in fact, it supplied proof that the remittance had not been so received.

In a letter written by the general agent of the express company at Milwaukee to plaintiff's attorney on November 26, 1917, it is stated: "For your information wish to state this money was tendered to the payee who refused it. We then offered the amount refunded by the company to the purchaser, who refused it." He then goes on to say that "The trouble is, the exchange market in rubles is declining right along, and we cannot refund the $1,000 less the cablegram and other expenses. . . . When the money was returned from abroad, or the advice of nonpayment reached our treasurer's office, we went into the market and sold at the current rate on that date, and, naturally, we offered this purchaser the amount recovered on the latter date. Just what amount will be returned I cannot say. I am writing to find out, and as soon as we hear I will advise you."

From this evidence it appears that the money was not delivered within ten days from date of remittance; that when attempted to be delivered the remittee refused it because it arrived too late. The express company does not deny that it still has the money. It does not deny that some restitution should be made to the plaintiff. Its contention is that plaintiff is not entitled to the full $1,000, but only to the depreciated value of the 4,000 rubles. We must therefore hold that under the verdict establishing the agreement of the express company and its failure to perform the same the plaintiff is entitled to recover the full amount paid.

While we have not discussed in detail appellant's numerous assignments of error, the foregoing discussion fully disposes of those which in our view of the case are in anywise material. The verdict of the jury has sufficient support in the evidence, and the judgment rendered thereon cannot be disturbed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs. on March 14, 1922.

BRIGGS, Respondent, vs. MILLER, Appellant.

December 14, 1921—March 14, 1922.

Contracts: Elements: Consideration: Unilateral contracts: Promise to indemnify past losses.

1. A complaint which alleged that defendant, a public lecturer upon applied psychology, offered to the world that if any one who had at any time lost any money in any of his business ventures would disclose this fact he would at once pay the full loss, and that plaintiff had sustained such a loss by accepting a note indorsed by defendant in 1895, that he informed the defendant thereof and demanded payment, which was refused, does not state a cause of action.
2. The court had jurisdiction of the subject matter of the action, and as plaintiff relied upon a new contract and not upon the original note or indorsement, the statute of limitations was not a defense.
3. A demurrer to a complaint on the ground that the action was not commenced within the time limited by sec. 4222, Stats., will be overruled where it does not appear from the complaint when the cause of action accrued.
4. In an action based on an offer to reimburse any one for a loss sustained through defendant's business ventures, *held,* that the bringing to the attention of defendant the fact of his prior liability did not confer any benefit upon the plaintiff nor amount to a detriment to defendant.
5. In order that a contract may arise, three things must concur: first, the offer; second, the acceptance; and third, the consideration. Where the offer is directed to a class of persons there may be acceptance by an act, and the performance of the act may identify one of the parties, complete the contract, and amount to a consideration; but the one accepting must perform some act other than the mere acceptance, and either confer a benefit upon the promisor or suffer a detriment.

APPEAL from an order of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Reversed.*

Demurrer. The complaint set forth at considerable length that the defendant was a public lecturer upon "Applied Psychology;" that in order to create in the minds of the public the impression that he was absolutely honest,

fair, and sincere in his teaching of the subject, and as a means of furthering the defendant's standing and reputation as a public speaker, and as a means of inducing the public to have confidence in him, "the defendant caused to be published to the world an offer that in the event that any one whosoever should have at any time lost any money in any of defendant's business ventures and who would come forward and show to the defendant such fact, he, the defendant, would immediately pay to such person the full loss so sustained." It was then alleged that the defendant started a certain business venture and that the plaintiff received the promissory note of the defendant's company for $1,200 for certain assets sold by the plaintiff to the defendant's company, which note was indorsed by the defendant personally; that said note was given on or about July 30, 1895, and was for $1,200, and was payable July 30, 1896; that no part of the interest or principal had been paid, and "that the principal of said note and interest thereon is a loss to the plaintiff directly flowing from one of the defendant's business ventures; that said business venture was the O. E. Miller Hernia Treatment Company, and the defendant was president thereof. That shortly after the publication of the defendant's offer to the world as above alleged, the plaintiff became advised thereof and did cause the defendant to be presented with a statement of the fact that the plaintiff had lost the above money through a business venture of the defendant and that said money and no part thereof had ever been paid to the plaintiff, and that the plaintiff's attention had been called to the general offer of the defendant above alleged, and that the plaintiff was then and there accepting the offer of the defendant in producing to him the facts regarding his loss growing out of the defendant's said business venture; that said plaintiff did then and there produce the facts regarding said loss to the defendant and the defendant did then and there admit the correctness of the same;" that the plaintiff demanded

that the defendant comply with his offer, which the defendant refused to do. Judgment was demanded for the sum of $1,200, together with interest thereon at the rate of six per cent. from the time of the loss, with costs and disbursements.

The defendant demurred to the complaint, first, on the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a cause of action; second, on the ground that the court had no jurisdiction of the subject of the action; third, on the ground that the action was not commenced within the time limited by sec. 4222 of the Statutes of Wisconsin for the year 1919.

From an order overruling the demurrer the defendant appeals.

For the appellant there was a brief by *Lenicheck, Boesel & Wickhem* of Milwaukee, and oral argument by *L. J. Lenicheck.*

For the respondent there was a brief by *Arthur H. Bartelt* and *Otjen & Otjen,* all of Milwaukee, and oral argument by *Mr. Bartelt.*

The following opinion was filed January 10, 1922:

ROSENBERRY, J. The court clearly had jurisdiction of the subject matter of the action, and as plaintiff relies upon a new contract and not upon the original note or indorsement, it not appearing when the new contract was made, the order overruling the demurrer upon the second and third grounds assigned needs no further discussion. It is the contention of appellant that the complaint states no cause of action for two reasons:

First, no consideration is shown.

Second, the offer was to a limited class of persons; that is, to those who "should have at any time lost any money in any of defendant's business ventures," and the plaintiff has not shown himself to be one of that class.

On the part of the plaintiff it is claimed that the com-

plaint sets forth a unilateral contract which came into existence by reason of the performance of an act by the defendant, to wit, by the defendant bringing to the plaintiff's attention the fact of the indebtedness set out in the complaint and that the performance of that act constituted an acceptance. If it be assumed that the offer was one made with the intention that it should become by acceptance a contract and that it was properly accepted, the question then arises whether or not there is a consideration sufficient to support the contract.

"The requirement ordinarily stated for the sufficiency of consideration to support a promise is, in substance, a detriment incurred by the promisee or a benefit received by the promisor at the request of the promisor. For unilateral contracts, which were the earliest recognized by the law and may still be regarded as the typical form, the statement is as accurate as a brief general statement can be." Williston, Contracts, § 102; *Drovers' Deposit Nat. Bank v. Tichenor,* 156 Wis. 251, 145 N. W. 777, and cases cited.

The plaintiff contends that there was a consideration, and that was the benefit derived by the defendant in that the offer and acceptance tended to create in the minds of the public the absolute honesty, fairness, and sincerity of those interested in teaching applied psychology in order to interest the public in the discussion and in order that the defendant might have the financial benefit which would thus accrue to him, it being alleged "that it was at all times herein involved and is now essential for the successful conduct of the defendant's business as a public speaker on the subject of 'Applied Psychology,' to create in the minds of the public the definite, decided impression that said defendant was and had been during his entire life absolutely sincere, trustworthy, and unqualifiedly honest." The difficulty with the contention of the plaintiff is that the alleged benefit proceeds not from the act performed in acceptance of the offer, but rather from the performance by the de-

fendant of his promise. The mere act of acceptance by bringing to the attention of the defendant the fact of his prior liability did not confer any benefit upon the plaintiff nor did it amount to a detriment to the defendant in a legal sense. If the mere trouble involved in making an acceptance amounted to a consideration, then there would in every conceivable offer and acceptance be involved a consideration. In order that a contract may arise, three things must concur: first, the offer; second, the acceptance; and third, the consideration. The case mainly relied upon by the plaintiff is *Carlill v. Carbolic Smoke Ball Co.* [1892] L. R. 2 Q. B. Div. 484. In that case the defendants were proprietors and vendors of a medical preparation called the Carbolic Smoke Ball, and they inserted in the Pall Mall Gazette the following advertisement:

"100*l.* reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks, according to the printed directions supplied with each ball. 1000*l.* is deposited with the Alliance Bank, Regent street, showing our sincerity in the matter."

The price of the ball was given as ten shillings, the price for refilling as five shillings. The plaintiff read the advertisement and on the faith of it bought one of defendants' carbolic smoke balls and used it as directed from November 20 to January 17, 1892, when she was attacked by influenza. She thereupon brought action against the defendants to recover the 100 pounds promised in their advertisement. The defendants pleaded that there was no contract between the parties and other defenses. The court said:

"It may be that, of the many readers of the advertisement, very few of the sensible ones would have entertained expectations that in the event of the smoke ball failing to act as a preventive against the disease, the defendants had any

intention to fulfil their attractive and alluring promise; but it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it that, to those who shall not find it as surely efficacious as it is represented by him to be, he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise.

"I notice that in the present case the promise is of 100*l.* *reward;* but the substance of the offer is to pay the named sum as compensation for the failure of the article to produce the guaranteed effect of the two weeks' daily use as directed. Such daily use was sufficient legal consideration to support the promise."

The benefit which was derived by the defendant in that case was the purchase of its product and the use of it by the plaintiff in the manner directed. The same is true in other cases of the same class. In the present case there was no use of anything by the plaintiff, nor did the plaintiff purchase anything, nor did the plaintiff perform any act other than the mere act of acceptance, which, as we have pointed out, does not amount to a consideration. That there may be an acceptance by an act, that the performance of the act may identify one of the parties, complete the contract, and amount to a consideration, there can be no doubt, a familiar instance being the offer of a reward for the performance of a certain act, and its performance by a party; but in those cases the one accepting performs some act other than the mere acceptance and either confers a benefit upon the promisor or suffers a detriment. The present case is clearly distinguishable from that class of cases.

We do not find it necessary to determine whether the defendant was one of the class of persons described in the offer.

By the Court.—Order reversed, and cause remanded with directions to sustain the demurrer.

A motion for a rehearing was denied, with $25 costs, on March 14, 1922.

NELSON, Respondent, vs. CADDO-TEXAS OIL LANDS COMPANY, Appellant.

December 14, 1921—March 14, 1922.

Corporations: Salary of officer: Waiver: Intent: Question for jury.

1. A waiver is the voluntary relinquishment of a known right. Intent to waive is an essential element of waiver; and while such intent may be inferred as a matter of law from the conduct of the parties, it is to be determined as a question of fact where the inference does not conclusively arise as a matter of law.
2. In an action by the director of a corporation to recover a fixed salary, his intent to waive the same is, under the evidence, *held* to be a question of fact which was properly submitted to the jury, and the judgment rendered on the verdict of the jury negativing such intent cannot be disturbed.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

Plaintiff was elected a director of the defendant corporation May 16, 1919. The corporation, by appropriate action, had fixed the salary of directors at $1,000 per year. The plaintiff served one year while the salary was so fixed. In May, 1920, the salary of directors was fixed at $10 for each week. Defendant continued to serve as a director until the month of June, 1920, and attended four meetings after the salary had been fixed at $10 per meeting. He brought this action to recover his salary, amounting, as alleged, to $1,040, in the civil court of Milwaukee county.

For answer and defense to the action defendant alleged

that on or about the 5th day of January, 1920, the plaintiff waived his salary as such director which had accrued up to December 31, 1919. Judgment was offered in the sum of $414.99, being the amount of salary that had accrued subsequent to December 31, 1919. A counterclaim was also interposed for the recovery of $1,325, being the amount of an alleged unlawful dividend declared by the board of directors on January 5, 1920, which counterclaim was, however, dismissed before the case was submitted to the jury.

The jury returned a special verdict, comprised of the following question: "On January 5, 1920, did *Dr. J. A. Nelson* waive his right to salary as director for the period ending December 31, 1919? *A.* No." Judgment was accordingly entered in favor of the plaintiff for the full amount of the salary claimed, with interest, which judgment upon appeal was affirmed by the circuit court. From the judgment of the circuit court affirming said judgment of the civil court defendant brings this appeal.

For the appellant there was a brief by *Brennan & Lucas* of Milwaukee, and oral argument by *Martin J. Brennan.*

For the respondent there was a brief by *Robinson & Saltstein,* attorneys, and *E. H. Pottinger,* of counsel, all of Milwaukee, and oral argument by *B. F. Saltstein.*

The following opinion was filed January 10, 1922:

OWEN, J. The only defense interposed to the action was that the plaintiff waived his salary which had accrued up to December 31, 1919, which alleged waiver is predicated upon the following state of facts: On the 5th day of January, 1920, there was submitted to a meeting of the board of directors held on that day, by the secretary of the company, a statement which showed an undivided profit of $5,036.08. This statement did not show the accrued portions of the annual salaries of the directors and officers of the corporation. It is claimed that if such accrued salaries had been disclosed by the statement it would have

revealed a loss instead of a profit. There is evidence to show that the fact that the financial statement did not reveal the accrued and unpaid portion of the annual salaries of the directors and officers of the corporation was discussed, and the secretary stated that such salaries did not become a liability of the corporation until the end of the year, and that the amount thereof would not properly appear on the statement. With this financial statement before it the board of directors declared a dividend of two per cent., amounting in the whole to $1,325. In view of the fact that the counterclaim, which set up a cause of action for the recovery of the amount of this dividend from the plaintiff, was dismissed it is unnecessary to consider the legality of the dividend then declared, and it leaves as the only issue raised by the pleadings the question whether the plaintiff waived his salary by his participation in the meeting of the board of directors January 5, 1920.

A waiver is the voluntary relinquishment of a known right. Intent to waive is an essential element of waiver. While the intent to waive may be inferred as a matter of law from the conduct of the parties (*Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 117, 105 N. W. 563), it is to be determined as a question of fact where the inference does not conclusively arise as a matter of law. *Robinson v. Pennsylvania F. Ins. Co.* 90 Me. 385, 38 Atl. 320; *Fishback v. Van Dusen,* 33 Minn. 111, 22 N. W. 244.

The argument of appellant is to the effect that the financial statement submitted to the board of directors when the dividend was declared failed to disclose the earned portion of the annual salaries of the directors and officers; that this fact was called to the attention of the directors; that if this item had appeared upon the financial statement it would have revealed a loss rather than a profit; that by declaring the dividend the directors must be held to have acted upon the assumption that profits existed out of which the dividend could have been paid, which fact could exist only upon the

theory that the amount of their salaries which had then accrued was waived. We do not think this inference necessarily follows. Numerous motives might have induced them to vote the dividend. They might have done it deliberately, knowing that there were no profits. They could voluntarily assume the liability which the law imposes upon them for so doing if they chose. They might have thought that it would be to the benefit of the corporation to declare a dividend even in the absence of profits, and there is evidence in the record to indicate that it was considered by the directors that by so doing future stock sales would be made easier. They might have thought that the future earnings of the company would be ample to pay their salaries when due, and that they were not impairing the capital stock of the company by declaring a small dividend, which by no means absorbed the entire surplus of the company as disclosed by the financial statement. Under such circumstances, an intent to waive their salaries is not necessarily imputed to the directors by reason of the paying of the dividend. Whether the plaintiff intended to waive his salary by his participation in the directors' meeting and voting to declare the dividend is a question of fact which was properly submitted to the jury, and the judgment rendered on the verdict of the jury cannot be disturbed.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $10 costs, on March 14, 1922.

STARK and others, Appellants, vs. BURNHAM BROS. BRICK COMPANY, Respondent.

December 15, 1921—March 14, 1922.

Sales: Written acknowledgment of oral order: Where goods are to be used: Rights of parties: Cash sales: Measure of damages upon nondelivery.

1. A written acknowledgment of a verbal order for goods becomes the contract between the parties.
2. A contract for the sale of brick to one erecting a building for a packing company and providing for delivery to such packing company contained no implied obligation on the part of the buyers that the brick was to be used solely in work to be done for that company; and the buyers having paid for all brick delivered and tendered payment for the undelivered brick, nondelivery was not justified because they insisted on their right to use the brick on other jobs, sub. 5, sec. 3315, Stats. (providing a penalty for using materials in the construction of any other building or improvement than that for which it was represented they were purchased), being inapplicable, since this was not a sale on credit and the contract did not contain any representation as to where the brick were to be used and the seller did not give written notice to the owner of the building or improvement under sub. 1 of sec. 3315.
3. Under sub. 3, sec. 1684*t*—67, Stats., the measure of damages for the nondelivery of the brick was the difference between the contract price and the market price at the time delivery was demanded, with interest from that date.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Reversed.*

The plaintiffs, copartners, were engaged in a general contracting business at Cedar Rapids, Iowa, and they began doing business as such in Milwaukee in the spring of 1918. Their first work was at the plant of the Plankinton Packing Company, and in the fall of that year and for some time thereafter they maintained their warehouse for equipment and materials at the yards of that company and for a time their office also.

On August 29, 1919, a writing was sent by defendant to plaintiffs which is set out in the opinion.

Delivery of bricks by defendant was commenced in December and continued until January 21, 1920, and commenced again about April 20th until May 3d, when about 52 M. brick had been delivered. Four several payments were made, paying substantially in full for the brick delivered, but the payments were not simultaneous with the delivery of the several instalments. In February plaintiffs demanded further and immediate delivery of the balance of the brick, but at defendant's request the date of the delivery was extended to May 1st.

At the end of April further demand was made for delivery of the balance of the brick. At about that time the defendant learned that some of the brick delivered at the Plankinton Packing Company yard had been used by plaintiffs on work being done by them in another part of the city and for somebody other than the Plankinton Packing Company, and on taking the matter up with plaintiffs' superintendent defendant was promised in writing by him that no more of the common brick would be taken to that other job. On May 1st, answering the letter of plaintiffs' superintendent, defendant writes that it will begin brick deliveries, which are "continued, however, on the understanding that the same are for use at your Plankinton Packing Company job and the same are to continue until the total of 360 M. required by you as per your superintendent are delivered and are all to be taken by August 1st."

May 3d plaintiffs answered the preceding letter, stating, "We want it clearly understood that we are at liberty to use these bricks wherever we please. We purchased 500 M. from you to be delivered at the Plankinton Packing Company, and that is all there is to it. If you do not intend to comply with this contract, advise by mail not later than the 5th of this month."

May 11th defendant answered the preceding letter, stat-

ing, in substance, that its position is that the brick were ordered for delivery at the Plankinton Packing Company for work to be done at that plant for which plaintiffs had contracts on August 29th. That the defendant stands ready to deliver such brick as may be required for the completion of that job or jobs not exceeding the balance of the contract, and also saying, "We will not deliver any brick at that job under the order of August 29, 1919, for use by you anywhere else than at the Plankinton Packing Company. We feel that this states our position, and unless we hear from you in regard to the matter by the 20th will take it that you do not agree with the above, that you intend to breach the terms of the order and thereby abandon your rights thereto."

On May 20th plaintiffs sent defendant a certified check for $5,410.20, the amount at the contract price for the balance of the brick under the order of August 29th, and demanding delivery of the brick. The following day defendant returned and refused to accept the check, referring to the position taken in the above quoted letter of May 11th. The price of brick had been rising during the winter and spring and was, at the time of this correspondence in May, $18 per M.

June 8, 1920, this action was commenced to recover the difference between the contract price of the undelivered brick and the market price thereof; defendant asserting a breach of the contract by reason of the foregoing situation on the part of the plaintiffs and denying any breach on its part.

At the close of the plaintiffs' evidence the trial court granted defendant's motion for a judgment of nonsuit, basing it upon the grounds that the plaintiffs, by using the brick in another building, breached the contract on their part and for that reason could not maintain this action, and there being an expressed willingness on the part of the defendant to deliver brick at the Plankinton Packing Company for use

in work to be done for that company, there was no breach on its part. From the judgment of nonsuit plaintiffs have appealed.

Orlaf Anderson of Milwaukee, for the appellants.

For the respondent there was a brief by *Fish, Marshutz & Hoffman,* attorneys, and *I. A. Fish,* of counsel, all of Milwaukee, and oral argument by *Mr. Fish.*

The following opinion was filed January 10, 1922:

ESCHWEILER, J. The writing of August 29th, accepted as it was by plaintiffs, became the contract between the parties. It reads as follows:

"Gentlemen: In accordance with the verbal order given our Mr. H. this a. m., we are today entering your order for 500 M. common brick at $12 per M. net delivered to the Plankinton Packing Company, Milwaukee. It is understood that all these brick are to be taken by you within six months from date."

We think it plain and unambiguous upon its face, and upon payment or tender of payment by plaintiffs to the defendant for the purchase price of such brick the plaintiffs became entitled to have the same delivered to them at the place designated in the contract. Upon payment the bricks became the property of the plaintiffs, and the defendant could have no concern with what was done with them subsequent to delivery and such vesting of title.

The contract was evidently one for the delivery of the brick by instalments. It is immaterial, however, whether the duty to pay for the same did not arise until completion of the entire delivery under sec. 1684*t*—42, Stats., or arose for each instalment as delivered, under sub. 2, sec. 1684*t*—45, because for the brick actually delivered payments were made and accepted without question from time to time, and as to the undelivered balance of the order a tender for the full amount thereof was made by certified check, and no question raised as to the sufficiency of that as a tender.

Neither from the face of the contract nor from the testimony in the record can we construe this contract as containing an implied obligation on the part of the plaintiffs that the brick therein specified are not only to be delivered at the Plankinton Packing Company's yard but are to be used solely in work to be done by the plaintiffs for that company.

It is urged by defendant that, inasmuch as sub. 5, sec. 3315, Stats., provides for a penalty for any person furnishing materials under a contract who shall purchase such materials on credit representing at the time of making the purchase that the same are to be used in a designated building or other improvement, and thereafter use said materials in the construction of any other building or improvement than that so designated without the written consent of the seller of the materials, such statute should be by implication considered a part of the contract, and that therefore the use by plaintiffs, or claim by them of right to use these brick for other work than that done for the Plankinton Packing Company, must be considered a breach of their contract obligation.

This contract was not a purchase upon credit, nor does the contract contain, even when read in the light of the surrounding circumstances, any representation that the same are to be used for any particular work or improvement for the Plankinton Packing Company by plaintiffs. Evidently it was not so considered at the time by the parties, because by sub. 1 of the same sec. 3315 a materialman situated as was the defendant here is required, within thirty days after furnishing the material for any specific building or improvement, to give written notice of such undertaking to furnish materials to the owner of the building or improvement. The record is silent as to any such notice having been given by the defendant to the Plankinton Packing Company in accordance with such provisions, and we cannot indulge in any presumption that such notice was given.

We are constrained to hold, therefore, that the plaintiffs were acting strictly within their legal rights under this contract at the time they made the tender for the balance of the undelivered brick on the contract price, and the defendant was not justified in then refusing delivery thereof as it did.

It is undisputed that the market price at the time of the tender was $6 per M. more than the contract price. It is conceded that there were 447,850 bricks undelivered. Their product, amounting to $2,687.10, together with interest thereon from May 20, 1920, measured the damages for which plaintiffs were entitled to judgment. This is the measure of damages under the statute (sub. 3, sec. 1684*t*—67). *Page Woven Wire F. Co. v. Staudenmayer,* 174 Wis. 154, 182 N. W. 746.

By the Court.—Judgment reversed, with directions to enter judgment for the plaintiffs for $2,687.10, with interest from May 20, 1920.

A motion for a rehearing was denied, with $25 costs, on March 14, 1922.

EHLERS, Administratrix, Respondent, vs. GOLD and another, Appellants. [Two appeals.]

January 11—March 14, 1922.

Pleading: Amendment: Discretion of court.

Where a liability insurer, joined as a defendant with an automobile driver in an action for injuries to and the subsequent death of plaintiff's husband, defended the action, the insurer's attorney representing both the insurer and the insured, and no concealment was practiced upon the insurer and no claim made by it that it was not liable because the injuries had been inflicted by a car substituted for that described in the policy until late in the course of the trial, the denial of an application after new trial ordered to allow an amendment to enable the insurer to plead that its policy did not cover injuries inflicted by the substituted car, was within the discretion of the court.

APPEALS from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed on both appeals.*

This was once before this court and is reported in 169 Wis. 494, 173 N. W. 325. We shall not restate the facts here, but the statement and opinion will be in the nature of a supplement to the case as reported in 169 Wis. 494.

Horace B. Walmsley of Milwaukee, for the appellant *Gold.*

J. Elmer Lehr of Milwaukee, for the appellant *Automobile Liability Company.*

Charles T. Hickox of Milwaukee, for the respondent.

The following opinion was filed February 7, 1922:

ROSENBERRY, J. On behalf of the appellant *Gold* it is contended that, it appearing that there was in the rear of *Gold's* car another car following upon which there were lighted lamps which sufficiently lighted the street, the finding of the jury that *Gold* was not in the exercise of ordinary care in the control and management of his car should be set aside. We shall not take up the evidence in detail, but a careful examination convinces us that there was ample evidence to sustain the verdict of the jury and that the trial court correctly denied the motions made by the defendant *Gold* to change the answers to the special verdict. Upon this trial the jury found that the collision occurred after 5:45 p. m. on October 12, 1916, and upon the car of the defendant *Gold* there were not displayed lamps giving a reasonably bright light in the direction in which the automobile was going; that the failure to display such lights was the proximate cause of the injuries to the deceased, Ehlers; that the defendant *Gold* failed to exercise ordinary care in the operation and management of his automobile at and immediately prior to the time that John Ehlers was injured; that the failure of the defendant *Gold* to exercise ordinary care in the operation and management of his auto-

mobile was the proximate cause of the injuries to John Ehlers; that John Ehlers was not guilty of contributory negligence; and assessed the damages to the estate of John Ehlers, exclusive of pain and suffering, at $779, pain and suffering $1,000, pecuniary injury sustained by the widow as the result of the death of John Ehlers $7,000. Upon motion for a new trial the amount assessed for the widow's pecuniary loss was reduced by the court to $5,000, and judgment entered accordingly. It is contended that the damages are still too large. The verdict having been approved by the trial court, it is considered that it should not be disturbed in this case.

The *Automobile Liability Company* was made a defendant, and, as appears in the report of the case in 169 Wis. 494, 173 N. W. 325, upon the first trial the *Liability Company* moved to amend its answer for the reasons there set out. The trial court denied the motion on the ground that the application for the amendment was not timely, and this disposition of the matter by the trial court was approved by this court. Prior to the commencement of the second trial the *Liability Company* again moved the court for leave to amend its answer and the motion was again denied and judgment was rendered against the *Liability Company*, from which it appeals.

It appears that the car which *Gold* was driving at the time of the accident was a new car of the same make, type, and description as that upon which the policy of insurance was issued, and differed from it in no respect with the exception of the factory number. It appears that the means of knowledge of the substitution of the new car for the one described in the policy was accessible to the *Liability Company* at all times. It had issued another policy of insurance upon the car described in the policy, which had been transferred by *Gold* to his brother. This occurred on August 9, 1916. On August 14, 1916, *Gold* reported the accident upon the blank furnished by the company, but failed to give

the factory number of the car as required. On November 25th a coroner's inquest was held, upon which the defendant *Gold* gave testimony showing the substitution of the new car and its factory number and the removal of the license obtained from the old car to the new car without notifying the authorities. It appears that a transcript of this testimony was in use upon the first trial. The *Liability Company* first demurred to the complaint for insufficiency on the ground that its policy contract covered only injuries to passengers and not to pedestrians, and upon the further ground that the *Liability Company* could not be joined as a party defendant with the insured. At the same time counsel for the company appeared on behalf of the defendant *Gold* and moved the court to strike out those portions of the complaint alleging a cause of action against the *Liability Company*. On June 30, 1917, the order was sustained. The plaintiff appealed to this court, where the order sustaining the demurrer was reversed. The cause being remitted, the *Liability Company* served a verified answer admitting that *Gold* at the time of the accident carried the policy contract of insurance alleged in the complaint and that he held his certificate from the railroad commission permitting him to operate as a bonded carrier and that his state license, motor vehicle factory number, and serial number are as set up in the complaint, and set up the defense that he was not then operating under the policy contract but was in pursuit of his private business. The first trial of the action was begun May 24, 1918, and upon that trial the application for leave to amend the complaint, passed upon in 169 Wis. 494, 173 N. W. 325, was made. Before the second trial and on January 12, 1920, the application was renewed. No concealment was practiced upon the defendant *Liability Company* either by the plaintiff or by *Gold*. *Gold* apparently was of the opinion that his insurance policy covered his liability, for the reason that he promptly reported the happening of the accident to the

Liability Company. If, as now claimed by the *Liability Company,* its policy was not applicable, it should have seasonably asserted its freedom from liability upon that ground. It chose, however, to litigate first the question of whether or not it could properly be joined, which could only be done by an admission that its policy of insurance was applicable. It then litigated the question of whether or not *Gold* was in the course of his business as a bonded carrier, and it was not until late in the course of the first trial that any attempt was made to assert no liability on the ground that the policy did not cover injuries inflicted by the substituted car. There having been no concealment, the means of knowledge having been open to the defendant, the same attorney representing both *Gold* and the *Liability Company* upon the first trial down to the time that the amendment was sought, it is considered that the trial court was within the exercise of sound judicial discretion in denying the application for leave to amend.

By the Court.—The judgment appealed from is affirmed upon both appeals.

A motion for a rehearing was denied, with $25 costs, on March 14, 1922.

SHARP, Administrator, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY and another, Respondents.

January 10—March 14, 1922.

Railroads: Automobile stalled on grade crossing: Negligence: Special verdict: Inconsistency: Inadequate damages.

1. The deceased had driven his automobile onto the track of the defendant interurban railway at a country grade crossing, where for some unexplained reason the automobile stopped and an approaching interurban car struck it. The evidence as to the period of time that the automobile remained station-

ary on the track being in conflict, it is *held* that a special verdict to the effect that the deceased was not negligent and that the motorman could not have seen the automobile on the track in time to have avoided a collision was not inconsistent, as the questions were for the jury, which was not bound to accept the statements of plaintiff's witnesses as to the time the car was stalled, and there was no evidence that the motorman was guilty of gross negligence.

2. A special verdict of $4,000 financial loss to a widow for the death of her husband, while lower than ordinarily found in such cases, is not so inadequate as to indicate that the jury were prejudiced in favor of defendant.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

One Albert E. Sharp was killed October 25, 1917, when the automobile which he was driving was struck by the interurban car of defendant at a farm crossing leading off to the west from the concrete highway of the Chicago road in the town of Oak Creek, Milwaukee county, about two and one-half miles south of South Milwaukee and fourteen miles north of Racine.

Suit was brought by his administrator on behalf of the widow for the financial loss to her by reason of such death and also on behalf of the estate for the injuries to the automobile.

Two causes of action were alleged: one based upon a claim of want of ordinary care on the part of the defendant resulting in the injuries, such alleged negligence being in substance a failure to maintain a safe and suitable plank crossing at the place of the accident as required by the ordinance of the town board; permitting the crossing and approach thereto to be in a muddy and unsafe condition, causing the automobile to become stalled just prior to the collision; operating the street car at a high rate of speed; failure by the defendant's employees to keep a proper lookout; and failure to apply the brakes or otherwise stop the car in time to avoid the accident.

The second cause was based upon allegations of gross negligence in that the defendant's motorman, in reckless disregard of the safety of the occupants of the automobile, continued to operate the street car at a high and dangerous rate of speed.

Damages were claimed as to the financial injury to the widow to the amount of $10,000, and $1,500 for the injury to the automobile.

Defendant's answer put in issue the material allegations of the complaint. The special verdict as submitted and answered was in effect as follows:

(1) The automobile became stalled on the track.

(2) "Ought the motorman in charge of defendant's street car, by the exercise of ordinary care, to have discovered the position of the automobile on the street-car track in time to have avoided a collision with it? *A.* No."

(3) (Not answered.)

(4) There was no want of ordinary care on the part of Mr. Sharp.

(5) Damages: To automobile, $375; to the widow, $4,000.

After motions by the parties the court directed the entry of a judgment dismissing the action on its merits and with costs in favor of the defendant. From the judgment entered in accordance therewith the plaintiff appealed.

For the appellant there was a brief by *Glicksman, Gold & Corrigan* and *W. J. McElroy,* all of Milwaukee, and oral argument by *Walter D. Corrigan.*

For the respondents there was a brief by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Carl Muskat.*

ESCHWEILER, J. The accident happened early in the afternoon of a clear day. The deceased and his wife had driven from Milwaukee and desired to go to a farmer's house on the west side of the interurban track of defendant. They had difficulty in locating the farm and had driven by

it twice, and made the last inquiry concerning it at what was known as the Ryan Road, about 1,365 feet north of the particular crossing. According to Mrs. Sharp's testimony they drove slowly south from the Ryan road, and when they came to this driveway she turned to look north and also south and no street car was in sight in either direction; the automobile then turned to the west, and when the rear part was still on the street-car tracks it was stalled for about a minute before the crash came, during which time her husband was shifting gears, and that she first saw the car when it was on the curve about two blocks to the south. A man who was driving his team from the south and just a short distance from the crossing at the time of the accident also testified, on plaintiff's behalf, that the automobile was stopped a half a minute or so while the driver was doing something with the gear shifts.

Defendant's motorman testified that the street car had stopped about 1,536 feet south of this point of collision at the Fitzsimmons road, and it then proceeded to the north until, at a point some 500 feet south of the particular crossing, he first saw the automobile approaching him from the north along the Chicago road, the concrete surface of which was about seven feet east of the street-car track.

He testified further that when he was about fifty to sixty feet south of the crossing in question the automobile turned from the concrete highway to the west to go in to the farm and that he immediately applied his brakes in an effort to stop, but was unable to do so in time, and that while the automobile was still in motion and had almost cleared the track the collision occurred, the automobile being turned almost squarely around and left on the side of the track, the street car proceeding about 300 feet further to the north before coming to a stop. His testimony that there was no stopping of the automobile on the track crossing and that it first turned in toward the west when the street car was about sixty feet to the south was supported by the testimony of

the conductor, who claims to have seen it while looking forward from the rear of the car, and by that of a passenger who was in the front end of the car.

It is urged on this appeal by the plaintiff that there should have been submitted on the issue of ordinary negligence questions as to whether the crossing was negligently maintained by defendant in violation of the town ordinance as to the requirements for such country crossings, and that there were errors in the charge of the court to the jury and in his rulings on the evidence, and further that the question of gross negligence should have been submitted to the jury.

By their answer to the first question of the special verdict the jury found that the automobile was stalled on the track prior to the collision. Such finding, therefore, was in accord with the testimony of Mrs. Sharp and the plaintiff's other witness. Such finding necessarily disregarded the testimony of the three witnesses for the defendant on that point, who were each positive that the automobile did not stop on its passage over the street-car track.

They also found by their answer to the fourth question that there was no want of ordinary care proximately contributing to the collision on the part of Mr. Sharp, the driver of the automobile.

By their answer to the second question, however, they found that in the exercise of ordinary care the defendant's motorman could not have discovered the position of the automobile on the street-car track in time to have avoided the collision.

Upon such verdict, in connection with the facts in the case, it is very strenuously argued on behalf of plaintiff that the verdict as rendered is inconsistent on its face and therefore could not support a judgment for the defendant, and that the new trial asked for by plaintiff should have been granted. This on the theory that Mr. Sharp, having been found to have exercised ordinary care and therefore not having been at fault, and that the automobile as a matter of

fact was stalled from some unexplained cause and stationary on the street-car track for at least some appreciable time before the collision, the further finding that there was no negligence on the part of the motorman, the only other human agency that could be responsible for the collision, was necessarily inconsistent with the other findings or indicated the probability that the jury acquitted the motorman of ordinary negligence because they must have believed him to have acted with gross negligence.

If the jury, having found that plaintiff's version, to the effect that the automobile did come to a stop while crossing the track, was true, were bound to accept the testimony of Mrs. Sharp or the other witness for plaintiff as to the length of time the automobile was so stalled, namely, from a half a minute to a minute or more, then the position taken by plaintiff on this appeal would undoubtedly be correct; for if the automobile was in fact stalled for half a minute, the street car, then going at the rate of thirty miles an hour, must necessarily have been more than a thousand feet to the south of the place of collision where the automobile stopped. That then, it being conceded that the crossing was directly in front of and in plain sight of the motorman for at least 800 feet, and it further appearing from the undisputed testimony that the street car could be, because it was, stopped in about 300 feet from the point of applying the brakes, the motorman with the automobile in sight while going such distance of 800 feet must evidently have failed to use ordinary care in not stopping the car. Furthermore, such a situation would have made an issue for the jury as to whether there was not a wilful disregard by the motorman of the evident danger to the stalled automobile, which might have properly been found by the jury to amount to gross negligence had such question been submitted to them as requested.

The difficulty here, however, is that it was entirely a question for the judgment and discretion of the jury, after consideration of the evidence, to arrive at a reasonably

probable conclusion as to the real state of facts, although in so doing they would necessarily have to accept in part only as well as discredit in some particulars the testimony of the witnesses on both sides.

Estimates as to the precise length of time the automobile was stationary on the track are necessarily quite uncertain when considered in connection with all the facts and circumstances. For instance, Mrs. Sharp testified that it took them about three minutes to drive from the Ryan crossing, 1,365 feet north of the place of accident, and that they were driving slowly; yet if they had been going no more than ten miles per hour they would have covered that distance in less than two minutes, and at fifteen miles an hour it would have taken about one minute. The testimony of the other witness for the plaintiff as to the distance he traveled with his team during the time he first saw the automobile approaching this crossing up to the time of the collision, also afforded ground for a conclusion that he might have been mistaken in his estimate. Again, the fact that no effort was made by Mrs. Sharp or her husband to escape from the automobile or no outcry made, either or both of which might naturally have happened had there been any appreciable length of time of delay in crossing, would also afford ground for the jury to believe that, though the automobile did actually stop, yet it was but momentary, and therefore warrant if not require them to find as they did, that there was no failure of ordinary care on the part of the motorman just before the collision. There being such a possible reconciliation between the several answers in the special verdict, we cannot say that the trial court erred in refusing to grant a new trial on the grounds so urged.

No explanation is made by plaintiff's evidence why the automobile became stalled on the crossing. For the jury to have ascribed the stalling of the automobile to defendant's failure to comply with the ordinance of the town board would have been, under this record, mere speculation, and

therefore the trial court properly refused to submit any such question to the jury.

Upon the view above stated that we have been forced to take as to the effect to be given to the answers made by the jury in the special verdict, we can see no grounds upon which it can be maintained that the trial court erred in failure to submit the proposed question as to any gross negligence by the motorman in the management of the car. The only theory upon which such question could be submitted would be that the testimony disclosed not merely a lack of observation on the part of the motorman, but that he did actually see, for some appreciable length of time before the collision, an evident situation of danger, and wantonly, not merely carelessly, disregarded his obligation to avert the same. Upon this record we cannot say that the court erred in refusing to submit such question.

It is further suggested by plaintiff that the $4,000 found by the jury as the financial loss to the widow from the death of her husband were so inadequate as to indicate that the jury were prejudiced in their verdict and therefore it should be deemed to have affected their answers to the questions which were found against plaintiff. Although the damages are, under the facts in this case, lower than those usually found by jurors in somewhat similar situations, yet we cannot say that they are so excessively low as to require us to say that the trial court erred in the discretion vested in him upon the whole situation in upholding the verdict as he did.

The disposition thus made of the main questions presented makes it unnecessary to discuss the other assignments of error as to the instructions to the jury or the rulings upon the evidence, for were there errors in any such matters we would not deem them prejudicial or sufficient to require a reversal of the judgment.

By the Court.—Judgment affirmed.

NEACY, Appellant, vs. DREW, City Treasurer, and others, Respondents.

January 14—March 14, 1922.

Municipal corporations: Cities of the first class: Special legislation: Validation of unlawful contracts: Taxpayer's action to recover moneys paid: Laches: Performance of contract while action pending: Pleading: Demurrer.

1. Sec. 925—91*a*, Stats. (sec. 1, ch. 10, Laws 1920, Spec. Sess.), validating any contract for the purchase of concrete posts in connection with a municipal lighting system of any city of the first class, applied only to the city of Milwaukee, and could never apply to any other city, and was in violation of secs. 31, 32, art. IV, Const., as special legislation.
2. Sec. 959*w*, Stats. 1919, providing for the ratification, validation, and confirmation of contracts which the common council of a city had authority to make, does not permit the ratification of any part of a contract void because the furnishing of the article provided for under it involved its manufacture by patented process, in respect to which the provisions of the city charter had not been complied with.
3. Upon demurrer it must be assumed that the allegations in a complaint are true.
4. When a taxpayer brings an action to restrain the performance of an alleged unlawful contract entered into by city officials, and pending the determination of the action the contract is performed, moneys expended by the city under such contract may be recovered if the court of last resort decides it to be invalid.
5. The bringing of such an action is favored in law and equity; and the complaint is not subject to demurrer as improperly joining two causes of action, in that it prayed that attorney's fees be paid out of the fund sought to be recovered.
6. A corporation entering into a contract with a city to furnish an article capable of being manufactured only by patented machines, in violation of the charter of the city and with full knowledge of the invalidity of the contract, was in no position to invoke the doctrines of equity in an action by a taxpayer in behalf of the city to recover money illegally paid to it under the contract.
7. Money illegally paid by officials of a city under such a contract could be recovered not only from the company receiving it, but also from the officials responsible for the illegal payment.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

The appeal is from an order sustaining the demurrer of the defendant *Universal Concrete Products Company* to the complaint.

For the appellant there were briefs by *Paul D. Carpenter,* attorney, and *Timlin & Dean,* of counsel, all of Milwaukee, and oral argument by *William H. Timlin.*

For the respondent *Universal Concrete Products Company* there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles,* of counsel, all of Milwaukee, and oral argument by *J. V. Quarles.*

For the respondent *Drew* and others there was a brief by *John M. Niven,* city attorney, and *C. W. Babcock,* assistant city attorney, and oral argument by *Mr. Babcock.*

DOERFLER, J. The action is one brought by the plaintiff as a resident and taxpayer of the city of *Milwaukee,* on his own behalf and on behalf of all others similarly situated, to recover from the defendants, for the benefit of said city, the sum of $155,204.62, with interest, such sum representing the amount paid by the city of *Milwaukee,* through its officers, to the defendant *Universal Concrete Products Company* on a certain contract entered into between said city of *Milwaukee* and said *Products Company,* which contract is alleged in the complaint as being void for reasons therein specified.

The defendant *Products Company* demurred to the complaint, first, upon the ground that the same does not state facts sufficient to constitute a cause of action, and second, that two causes of action have been improperly united, the second ground for the demurrer being based upon the prayer for relief in the complaint that attorneys' fees be allowed and paid to the plaintiff out of the fund recovered.

On May 4, 1920, a decision of this court was handed down in *Neacy v. Milwaukee,* 171 Wis. 311, 176 N. W. 871, that action being based upon substantially the same facts and allegations as are contained in the present action, with the exception that other parties have been added as defendants in this action, and that the relief prayed for in the reported case was for an injunction restraining the defendant city and its officers from paying out any of the city's moneys on the contract therein referred to, for the reason that the contract was void and was illegally let, while in the instant action judgment is prayed for, for the benefit of the city of *Milwaukee,* for a recovery of all moneys paid out by the city of *Milwaukee* on such illegal contract, with interest, etc. In the reported case referred to, it was in substance held by this court that the alleged contract therein referred to was void because, first, in the letting of said contract the commissioner of public works exceeded his authority because such commissioner exercised power which properly vested in the common council of said city; second, because the contract as let violated the charter of the city of Milwaukee, in that the article to be furnished under the provisions of the contract was an article capable of being manufactured only by patented machines, and because the provisions of sec. 23, ch. V, of the city charter were not complied with; and third, because in the letting of said contract there was no competition, as is required by the provisions of said city charter.

The action in the reported case was commenced on the 6th day of April, 1917, and, a temporary restraining order having been issued, such order was by the circuit court, on June 11, 1917, vacated. The action having come on for trial before the circuit court in the fall of 1918, judgment was entered on December 4th of that year dismissing plaintiff's complaint, with costs, and an appeal was thereupon taken from such judgment to this court, which appeal was

placed upon the August, 1919, calendar of this court and heard and determined as hereinbefore stated.

Shortly after the decision in the case reported in 171 Wis., *supra,* at a special session of the legislature ch. 10 of the Laws of 1920 was passed, which act is as follows:

"An act to create section 925—91*a* of the statutes, validating certain contracts.

"*The people of the state of Wisconsin, represented in Senate and Assembly, do enact as follows:*

"Section 1. There is added to the statutes a new section to read: Section 925—91*a*. Any contract for the purchase of concrete posts or poles in connection with the municipal lighting system of any city of the first class, however incorporated, which has been entered into prior to September 23, 1916, upon which payments have been made and satisfactory material delivered, and such posts or poles are made by machine covered by patent, which contract has, prior to the first day of May, 1920, been declared invalid due to failure of any such city or its officers to comply with sections 925—90 to 925—91 of the statutes, inclusive, or provisions of the special charter of any such city relating thereto, shall be and hereby is made valid; and all payments previously made thereunder or thereafter to be made thereunder are declared valid and binding on any such city and its officers, any provisions of the charter of any such city or of the statutes notwithstanding.

"Section 2. This act shall take effect upon passage and publication."

Immediately after the passage of said legislative act the defendants received notice that the plaintiff considered said act unconstitutional and that he would challenge the constitutionality of such act, and thereupon the said city, with the consent of the defendant company, canceled the unfinished portion of the contract.

On the part of the plaintiff it is contended that the above curative act is unconstitutional because at all times mentioned in the complaint the city of *Milwaukee* was and is the

only city of the first class in the state of Wisconsin, and because the act applies only to the city of *Milwaukee,* and can never apply to any other city, and that it therefore violates secs. 31 and 32 of art. IV of the constitution of the state. The constitutional issue raised with respect to ch. 10 aforesaid has been repeatedly before this court in cases involving legislative acts similar to ch. 10 aforesaid, and it has been uniformly held that such legislation is unconstitutional and violative of the constitutional provisions above referred to because it is special legislation. *Johnson v. Milwaukee,* 88 Wis. 383, 386, 60 N. W. 270; *Boyd v. Milwaukee,* 92 Wis. 456, 465, 66 N. W. 603; *Cawker v. Central B. P. Co.* 140 Wis. 25, 121 N. W. 888.

In *Cawker v. Central B. P. Co., supra,* the constitutionality of ch. 677, Laws of 1907, an alleged curative statute and similar in all respects to ch. 10, *supra,* was challenged. The act involved, among other things, provided:

"In all cases where any municipal corporation of the first class in this state shall have heretofore entered into any contract or contracts with any person, firm or corporation for the construction of any pavement or pavements, which contract or contracts are illegal because requiring the use of patented materials in whole or in part," etc. (The balance of the act contains the curative portion thereof, similar in all respects to ch. 10, above referred to.)

In the decision of the court, Mr. Justice TIMLIN writing the opinion says:

"The constitution of this state (art. IV, secs. 31, 32) forbids the enactment of any special law to amend the charter of a city, and requires the legislature to provide general laws for 'the transaction of any business' thus prohibited, and requires that such general laws be uniform in their operation throughout the state. . . . Milwaukee is the only city which now is, or which ever in the past has been, in this first class according to legislative classification by population. The act, relating wholly to past conditions, is therefore special, as much so as if the city of Milwaukee were

expressly named therein. *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603. . . . We must hold that the curative statute in question is unconstitutional and void."

Ch. 10, therefore, under the decisions aforesaid, clearly violates the constitutional provisions above referred to, and we therefore hold such statute unconstitutional and void.

Counsel for the *Products Company,* in its brief, contend that, inasmuch as the common council by resolution canceled the contract with the *Products Company* after it had received notice that this court had held it invalid, by such cancellation it ratified the contract up to the time of the cancellation, and that the council had ample authority to ratify such contract pursuant to the provisions of sec. 959*w,* Stats. 1919, which reads as follows:

"The common council of any city, however incorporated, is authorized and empowered to ratify, validate and confirm by a majority vote of the members thereof, any contract, either written or oral, heretofore entered into or purported to be entered into by any officer or department of such city in the forming of which the proper proceedings may not have been regularly taken; provided, that the other contracting party has performed his share of said contract; and that such contract was one which the common council had authority to authorize; and the common council of any such city is authorized and empowered to ratify, validate and confirm all proceedings in relation thereto, and when so ratified and confirmed the obligation of such contract shall be as binding to all intents and purposes as if such contract had been regularly entered into."

Assuming that said sec. 959*w,* Stats. 1919, is in all respects a valid statute, it has no application to the issues involved in this action for the reason that such statute provides for a ratification, validation, and confirmation of contracts which the common council had authority to make and which contracts may be void for lack of certain proper proceedings.

In *Neacy v. Milwaukee,* 171 Wis. 311, 176 N. W. 871, the contract involved in this case, among other things, was

held void because the furnishing of the article provided for under the contract involved the manufacture of the article by patented process, and because the provisions of the charter in that behalf had not been complied with. In other words, the common council has no authority to let a contract for the furnishing of a patented article or one manufactured by and which can be made only by the use of a patented machine, unless the specified provisions of the charter in that regard are expressly complied with. Such provisions of the charter are merely amplifications and declaratory of the common law, and are designed to induce competition so as to enable a municipality not only to obtain the benefit of the articles to be furnished at the lowest possible cost, but to prevent favoritism and graft. If the council had no authority in the first instance to let the contract because it violated the provisions with respect to patented articles and processes, then it had no authority to ratify a contract entered into in violation of such provisions, and any holding to the contrary would simply annul and emasculate the beneficent design of the law and of the legislature, intended to protect the public interests. The failure to comply with the statute with respect to the patented article or process is not, as is contemplated by sec. 959*w*, Stats. 1919, a mere irregularity which is curable by subsequent ratification, but is a fundamental defect not reachable by such curative act.

We therefore hold that sec. 959*w* cannot and does not cure the omission in the proceedings resulting in the contract in question, and that such contract is void, in accordance with the decision of this court in *Neacy v. Milwaukee,* 171 Wis. 311, 176 N. W. 871.

Counsel for the defendant company in their brief further raised this question: "Can the money paid by the city in good faith for the lighting posts which the *Concrete Company* has delivered over a period of five years be recovered from the *Concrete Company* and the city officials?"

Contracts entered into by private individuals of a nature similar to the one under consideration, and where the full price has been paid and the articles delivered, stand in an entirely different category from a contract entered into by a municipal corporation. As is said in *Frederick v. Douglas Co.* 96 Wis. 411, 423, 71 N. W. 798:

"There are many cases which hold that, as between man and man, money paid voluntarily, with knowledge of all the facts, and without fraud or duress, cannot be recovered merely on account of ignorance or mistake of the law. . . . This is simply the doctrine of voluntary payment. It is frequently applied to the payment of illegal taxes. It is founded upon the general principle that a man may do what he will with his own. He may give it away, or buy his peace; and, if he does so with knowledge of the facts, he is generally remediless."

Public officers, however, are not dealing with their own property but with the property of the public. They are trustees of the public moneys and property, and are not only obliged to act in entire good faith, but are surrounded by certain legal restrictions which in the exercise of their official duties they are obliged to heed, and which if violated may result disastrously to them. As trustees of public property their acts are subject to close scrutiny. To hold that a public official can exceed his corporate powers in the letting of a contract, or in so doing be guilty of acts of favoritism to others, or of graft, to the great detriment of the official body that he represents, and that he may be screened or protected from liability because his unlawful act has been executed and the moneys expended, would constitute a dangerous and demoralizing doctrine, resulting in disaster to the proper administration of public affairs. Such holding, as is said in the *Frederick Case* aforesaid, would be "to introduce a vicious principle into municipal law, and a principle which would necessarily sweep away many of the safeguards now surrounding the administration of public affairs. Were this, in fact, the law, it can

readily be seen that public officials could at all times, with a little ingenuity, subvert and nullify that wholesome principle of the law which prohibits their spending the public funds for illegal purposes. . . . We cannot approve of such a doctrine."

Defendants' counsel to a large extent rely upon the decision in the *Frederick Case* above referred to. In that case a large sum of money, in excess of $2,000, was illegally paid out by Douglas county to an attorney named Grace for assisting the district attorney in conducting certain extensive and necessary tax litigation. Mr. Grace was employed in January, 1895, and rendered valuable services for the county until the fall of the year. It was a matter of public notoriety in Douglas county that Grace had been so employed and that he was devoting his valuable time in the interests of the county for the purpose of performing the services for which he was hired. Not until November of the same year was the legality of such hiring, or the payment of money on account thereof, challenged by an action brought by Frederick as a taxpayer, for the benefit of the county, to recover the moneys illegally expended and to restrain the county from making any further payments. In its decision in that case this court says:

"Could it, under any view of the circumstances, be said to be equitable to compel Mr. Grace to pay back the money which he received for long and valuable labors, rendered honestly and in good faith, the benefit of which the corporation has received, and *concerning which the taxpayers of Superior were, or ought to have been, fully informed during their entire progress?*"

From the foregoing quotation the *Frederick Case* can readily be distinguished from the instant case. Shortly after the letting of the illegal contract to the *Concrete Company* the plaintiff herein brought an action based upon the illegality of such contract, and in which he prayed for an injunction restraining the city from paying out any of its

moneys on account thereof. The action did not come on for trial until the fall of the year 1917, and in fact was not decided until December, 1918. The city had every opportunity to press that action for trial, for the reason that it involved a vital matter of public interest, and we are safe in saying that the trial of the action would have been advanced if application therefor had been made by the city. We are also of the opinion that the plaintiff was not guilty of any laches in taking his appeal to this court upon the filing of the decision in the circuit court. In bringing his action for an injunction plaintiff sharply challenged the illegality of the contract involved, and, in the exercise of the proper precaution devolving upon public officials in a matter of this kind, the letting of the contract and the execution thereof should have awaited the final outcome of the litigation in this court. True, the circuit court sustained the contention of the defendants; but such court is not one of last resort. Shortly after the rendition of the decision in the lower court the appeal was taken to this court. When the decision was rendered by this court as reported in 171 Wis. 311, 176 N. W. 871, the cause was remanded to the circuit court and now rests there undetermined. Thereafter the action in the instant case was begun for the purpose of recovering back the moneys alleged to have been illegally paid out by the city through its officials. While the plaintiff, in the action for an injunction, did not pray for a recovery of moneys illegally paid, the complaint in such action was at all times subject to be amended, up to and during the time of the trial of the action.

The situation, therefore, presented in the instant case differs materially from that presented in the case of *Frederick v. Douglas Co., supra,* and a careful reading of the opinion in the latter case will reveal the fact that the very element missing in the *Frederick Case* has been supplied in the instant case, and that if the validity of the contract of the county with Grace had been timely and properly chal-

lenged, the ultimate decision in the *Frederick Case* would have been favorable to the plaintiff therein.

At all times referred to in the complaint, the decision of this court in *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603, constituted the law in this state with reference to a situation such as is presented in the instant case. In the *Chippewa Case* this court uses this language:

"We do not perceive how what was done by the parties after the commencement of the action, whereby they will suffer loss if appellant succeeds, should have any weight in the matter. Certainly, they took their chances, in proceeding after being admonished by the commencement of the suit that the validity of their contracts would be judicially investigated. Sometimes laches on the part of a taxpayer in commencing an action of this sort materially affects the quantum or character of the relief which equity will afford him, as was the case in *Frederick v. Douglas Co., supra;* but the action having been seasonably commenced for all purposes, the defendants cannot, as a rule, reasonably expect to obtain any great or lasting advantage by accomplishing in the interim between such commencement and the final adjudication of the rights of the parties the thing sought to be prevented. They may proceed, there being no provisional remedy to prevent it, so as to preclude preventive relief of an effective character at the close of the litigation, laying themselves liable, however, to restore the public money obtained by them, and to recoup their loss, so far as practicable, by such lawful means as may be open to them."

The decision in the *Chippewa B. Co. Case* applies in all its force to the instant case. The temporary injunction was dissolved, but the case still continued, and the challenge of the legality of the contract continued until the final disposition of the cause. The defendant city and its officers, together with the *Products Company,* could therefore proceed with the execution of the contract, which they did; but in doing so they proceeded at their peril, and they are not now in a position to complain when it has been held not only that their contract was illegal, but that the curative act

known as ch. 10, aforesaid, is declared unconstitutional and void.

Whether or not the contract with the *Products Company* was let in good faith is a subject concerning which, to say the least, there may be considerable doubt and difference of opinion. The complaint, properly construed, charges bad faith. Upon demurrer it must be assumed that the allegations contained in the complaint are true. Under the decision in *Neacy v. Milwaukee,* 171 Wis. 311, 176 N. W. 871, it was held that the commissioner of public works acted without authority in setting aside all bids when he did so, and, notwithstanding such act of the commissioner was in direct violation of the charter provisions of the city of *Milwaukee,* the common council failed to take any action with respect to such violation. When the specifications thereafter for the construction of the lighting posts were prepared by the commissioner of public works, he by such specifications clearly attempted to accomplish indirectly, with respect to the use of an article manufactured by a patented machine, that which he clearly could not do if the specifications had specially provided for an article to be manufactured by a patented machine. By taking the course chosen by him, he clearly evinced an intention to accomplish his purpose despite the provisions of the organic law of the city. A contract under these circumstances was let to the *Products Company* without protest and with the approval of the council and the city officials. The illegality referred to was sharply challenged by the plaintiff's action for an injunction, but the warning thereby given remained unheeded. The illegal contract invited by the city and its officials was stubbornly executed, and the moneys of the city paid to the company by the trusted city officials. Bad faith is therefore properly alleged in the complaint.

The plaintiff in this action cannot possibly gain any personal advantage from the final success achieved. He appears as a taxpayer for the benefit of taxpayers. If the whole

amount of money paid out under the contract is repaid to the city of *Milwaukee,* the proportionate amount which would inure to his benefit would be an insignificant trifle. Similar actions are favored in the law and by courts of equity because they are designed to secure to public corporations their proper rights and to protect them from illegal acts. An action of this nature by a taxpayer, begun in good faith, is stamped not only with a desire highly equitable in its nature, designed to promote the public welfare, but is indicative of an altruistic motive, redounding to the credit of the person resorting thereto; for it can readily be seen that such actions involve not only a sacrifice of material means, but oftentimes hold the moving party up to public criticism and censure. To commence and prosecute such an action in good faith requires not only moral courage but a high degree of civic interest and pride. Therefore we say that if litigation is at all favored by the courts, it is in an action of this nature brought by a private citizen for a public interest.

The *Products Company,* it must be assumed, entered into this contract with full knowledge, and thereby aided and abetted the illegal acts of the city officials. Therefore, it is in no position to invoke the doctrines of equity.

The money, therefore, illegally paid may not only be recovered from the *Products Company* but also from the officials responsible for the illegal payment. *Wilcox v. Porth,* 154 Wis. 422, 143 N. W. 165.

The objection taken by demurrer, that two causes of action in the complaint are improperly joined, is not deserving of extended consideration. The fact that the plaintiff in his prayer for relief prayed for the payment of attorneys' fees to be paid out of the fund is not a proper subject for demurrer. *Moritz v. Splitt,* 55 Wis. 441, 13 N. W. 555; *Hawley v Tesch,* 72 Wis. 299, 39 N. W. 483.

The order of the circuit court is therefore reversed, with

directions to the lower court to overrule the demurrer, with the privilege to the respondent to interpose an answer upon such terms as the lower court may direct.

By the Court.—Order reversed.

PETITION OF LONG: LONG, Appellant, vs. THE STATE, Respondent.

February 7—March 14, 1922.

Appeal: Right to appeal: Appeals not given by statute: Compensation to innocent person imprisoned for crime: Decision of board of control: Review.

1. In cases where a new right is created by statute and a remedy prescribed, the prescribed remedy is exclusive. The right of appeal, being purely statutory, does not exist where it is not given by statute.
2. Sec. 3047, Stats., providing that appeals may be taken from the circuit court to the supreme court, is not applicable where the circuit court is given power to review the proceedings of special inferior tribunals, boards, and commissions which have power to perform certain limited specific administrative or *quasi*-judicial duties, where the law creating the tribunal, board, or commission gives no right of appeal from the determination of the circuit court.
3. An appeal does not lie to this court from a judgment of the circuit court dismissing a petition for compensation on account of unlawful imprisonment, on appeal from the disallowance of the claim by the board created by sec. 3203*a*, Stats., for the relief of persons who have served terms of imprisonment upon conviction of crime of which they were innocent, notwithstanding sec. 3047 provides for appeals to this court from the circuit court, since the right of appeal from the judgment of the circuit court in such case is not provided for by statute.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Dismissed.*

By sec. 3203*a*, Stats. 1919, the governor and the members of the state board of control were constituted a board to be known as the board for the relief of persons who have served terms of imprisonment upon conviction of crime against the state of which they were innocent. Provision is made for presentation of the case by petition to the board, and upon such hearing the board is required to find that it is clearly beyond reasonable doubt that the petitioner was innocent of the crime or offense for which he suffered imprisonment, and in determination of the issue the board is limited by the terms of the statute to consideration of such evidence or circumstances as have been discovered or as have arisen since the trial and conviction. If the board finds that the petitioner was innocent with certain limitations prescribed by the act, compensation may be awarded. By sub. 5 the board is required to keep a full and complete record of its proceedings in each case and of all the evidence produced before it. "The findings and the award of the board shall be subject to review on an appeal, by the circuit court for Dane county, but the appeal shall be subject to the same limitations as apply to the findings and awards made by the board."

The petitioner had a hearing before the board. His claim was disallowed. He applied to the circuit court for Dane county and that court entered a judgment dismissing the petitioner's application, from which judgment the petitioner appeals to this court. The respondent moves to dismiss the appeal.

For the appellant there was a brief by *Wallace Ingalls* of Racine, attorney, and *F. M. Wylie* of Madison, of counsel, and oral argument by *Mr. Wylie.*

For the respondent there was a brief by the *Attorney General* and *Winfield W. Gilman,* assistant attorney general, and oral argument by *Mr. Gilman.*

ROSENBERRY, J. On behalf of the petitioner it is argued that by the provisions of sec. 3047, Stats., an appeal lies in this case. It is there provided: "Appeals to the supreme court may be taken from the circuit courts . . ."

On behalf of the respondent it is contended that under the doctrine of *Clancy v. Fire and Police Comm'rs,* 150 Wis. 630, 138 N. W. 109, no right of appeal to the supreme court having been provided by the statute which created the right and prescribed the remedy, none exists. While the language under consideration in the case of *Clancy v. Fire and Police Comm'rs* is materially different from the language of sec. 3203*a,* in that sub. 22 of the act under consideration in the *Clancy Case* contained a provision to the effect that if the decision of the board be sustained on review by the circuit court the order of discharge should be final and conclusive in all cases, nevertheless the authorities there cited and the reasons there given are controlling. In cases where a new right is created and a remedy prescribed, the prescribed remedy is exclusive. The right of appeal is purely statutory, and in cases where it is not given in statutes such as the one under consideration it does not exist. *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964; *Puffer v. Welch,* 141 Wis. 304, 124 N. W. 406. The decision in the *Clancy Case* went upon two grounds and would have been decided as it was if sub. 22 had not contained the language it did.

In the *Clancy Case* it was argued, as here, that the right of appeal existed because the language of the act brought it within the terms of the statute (sec. 3047). The necessary inference from the decision in that case is that sec. 3047, giving the right of appeal, does not apply to a situation such as is presented by the facts in this case. It is applicable only to those judgments rendered in the usual and ordinary course of judicial proceedings and is not applicable where the circuit court is given power to review the proceedings of

special inferior tribunals, boards, and commissions which have power to perform certain limited specific administrative or *quasi*-judicial duties where the law creating the tribunal, board, or commission gives no right of appeal from the determination of the circuit court.

By the Court.—Motion to dismiss the appeal is granted, and the appeal is hereby dismissed.

ESCHWEILER, J. (*dissenting*). I could concur in the dismissal of this appeal were it placed upon the ground that this being a claim against the sovereign, which cannot be sued at all without its consent, a claimant against the state has no rights save those expressly given. I cannot, however, agree with the grounds stated in the majority opinion.

Statutes granting or regulating appeals are remedial, should have a liberal construction, and are favored. *Hixon v. Oneida Co.* 82 Wis. 515, 529, 52 N. W. 445; *State v. Nangle,* 82 W. Va. 224, 95 S. E. 833, and cases there cited; 3 Corp. Jur. 319; 2 Ruling Case Law, 29.

So far as the circuit court is concerned, the disposition there of this matter was either a judgment of the circuit court for Dane county as in form it appeared to be, or, if not a judgment, then at least it was an order finally disposing of the matter. In any event the matter was a proceeding in a court of justice.

Remedies in courts of justice in this state are divided, under sec. 2594, Stats., into actions or special proceedings.

An action is defined by sec. 2595, Stats., as the ordinary proceeding in a court of justice for the enforcement or protection of a right, the redress or prevention of a wrong, or for the punishment of a public offense.

Sec. 2596, Stats., then provides that "every other remedy is a special proceeding." If this be a judgment in an action, then it comes within the letter of sec. 3047, Stats., the one cited and construed in the majority opinion. If, however, this is a special proceeding as distinguished from the ordinary action, then I think sec. 3048, Stats., becomes appli-

cable. This provides that no writ of error shall be necessary to bring up any judgment for review before the supreme court, but that any such judgment as is provided for in sec. 3047, Stats., *supra,* "or any order defined in section 3069 may be reviewed upon an appeal by any party aggrieved." The orders reviewable by appeal to this court are provided for by sec. 3069, Stats., which gives the right of appeal, by sub. (2) thereof, to any aggrieved party from any final order affecting a substantial right made in special proceedings.

Although the proceedings here were instituted under sec. 3203*a* before a special board or body created for that purpose, yet the finding and award of such board become subject to review on appeal by the circuit court for Dane county. When they so reach the circuit court they then come within the general jurisdiction of that circuit court and are no longer before a special tribunal. The rule, therefore, as stated in *State ex rel. Cook v. Houser,* 122 Wis. 534, 595, 100 N. W. 964, to the effect that when a new right is created by statute with a special tribunal for the enforcement thereof, no specific provision for appeal being given, the remedy before that tribunal is exclusive, is not applicable. Neither is the situation here like that in the case of *In re Aldrich,* 114 Wis. 308, 90 N. W. 173, where proceedings were instituted before the judge of the circuit court to remove a clerk of the court,—in the latter case it being held that a private individual having instituted the proceedings was not aggrieved by the refusal of the judge in that case to remove such clerk and therefore had no right of appeal. Here the claimant is, beyond question, one aggrieved by the result reached in the circuit court.

I cannot agree that the case of *Clancy v. Fire and Police Comm'rs,* 150 Wis. 630, 138 N. W. 109, cited and relied upon in the majority opinion, meets the situation here. The statute there passed upon expressly provided, as recited on page 634, that the decisions of the board, when sustained on appeal to the circuit court, become final and conclusive,

and such positive direction was declared in the opinion (page 633) to be of much more weight in the conclusion there reached than the mere negative inference from the lack of any provision expressly granting an appeal to this court.

An examination of the statutory provisions for the judicial review of findings or awards made by the various commissions, as shown for example in secs. 2394—19, 2394—21, 1797—16, and 1797*m*—69, Stats., are all provisions for the shortening of the time in which appeals in such matters can be taken to this court rather than express grants of power to take such appeals.

The appellate and superintending control over inferior courts granted to this court by sec. 3, art. VII, of the constitution should be favored rather than restrained, and I do not think it clearly appears that the legislature intended that the claimant here should be deprived of the rights that the ordinary party to special proceedings in the circuit courts of this state has under sec. 9 of art. I of the constitution.

F. W. WOOLWORTH COMPANY, Respondent, vs. VOGELSANG and another, Appellants.

February 7—March 14, 1922.

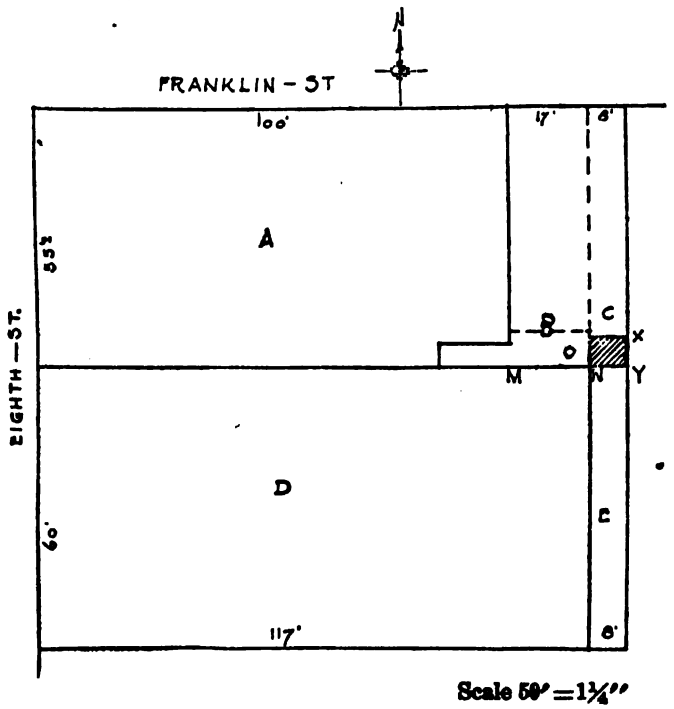
Easements: Description in grant: Definiteness: Practical construction: Use of servient estate: Appeal: Rules for future guidance of parties.

1. In a deed conveying a tract of land, a grant of a right of way of "eight feet on the east side" of a tract owned by the grantors is construed to cover the east eight feet of the tract, the east line of this land being coterminous with the east line of the right of way.
2. If the deed were indefinite, the end of a party-wall constructed by mutual agreement would determine the location of the right of way.

3. The owner of the servient estate is entitled to make such use of the strip affected by the right of way as he may without unreasonably interfering with the use of the right of way by the dominant owner.
4. The owner of an estate subject to a right of way for a driveway cannot erect posts to support a roof over the driveway which encroach thereon so as to leave a space only seven feet six inches wide, or only ten inches wider than the trucks used by the owner of the driveway, since such narrowing of the driveway is a substantial impairment of the right of way.
5. On appeal from a judgment enjoining an unlawful use of a right of way the court will not, although urged by the parties, lay down general rules in regard to the future use and enjoyment of the premises.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The facts in this case can be presented much more clearly and briefly by aid of the accompanying diagram:



The plaintiff is lessee of the premises indicated by D and E. E is vacant and upon D there is a building. The defendants own the premises A, B, and C. A is occupied by a building, B and C are vacant. The premises were formerly owned by William Rudolph and Bertha Frances Rudolph. They conveyed to predecessors in title of the defendants the south parcel of land represented on the diagram by D and E, "also including the right of way eight feet on the east side of the west one-half of lot 4 leading to so-called Franklin street," being the parcel indicated as C on the accompanying plat. At the points X and Y and on the easterly line of the right of way the defendants erected posts which partially supported a roof over the shaded portion of C. Many facts were found which are not material to the controversy here. The court found that it was the intention of the parties to the deed to give the grantees a right of travel or passage on foot and for teams and vehicles upon and over said strip, to and from the south sixty feet of the west half to and from the premises conveyed, and that it was not the intention to convey the fee or any other right or interest therein than the right of travel or passage thereupon; that one of the posts erected encroaches into and upon said way to a distance of five inches, and the other post to a distance of six inches; that the width of the motor truck on which goods are carried over said right of way to the rear of the store building occupied by plaintiff is six feet and eight inches; that each of said posts contracts or narrows said way to such an extent as to cause serious inconvenience in the use of said way by teams and vehicles, and especially by motor trucks used in the carrying of merchandise and other articles over said way; that the defendants for that reason are not entitled to maintain either of said posts within said way or strip, and that the defendants should be required to remove the posts therefrom and thenceforth to leave said right of way wholly free and unobstructed to the full extent of its width and length, so long

as it shall exist as such under and pursuant to the deed by which it was created. The court found that the roof as maintained did not inconvenience the plaintiff and that said roof could be supported by posts or pillars wholly without the right of way. The court further found that the allegations contained in the plaintiff's complaint to the effect that the defendants threaten to erect a retaining wall on said strip or said right of way for an addition to their store building to be supported over said way or strip are not proved. The court further found that the defendants should be allowed thirty days, from and after the date of service on them or on their attorneys of notice of the entry of judgment herein, in which to remove said posts from said way, and also to remove therefrom said roof, or otherwise provide lawful means of support for said roof if they shall decide to continue it above said way. The damages were stipulated at six cents, and there was judgment in accordance with the findings, from which the defendants appeal.

For the appellants there were briefs by *Kelley & Wyseman* of Manitowoc, and oral argument by *H. F. Kelley.*

For the respondent there was a brief by *Hougen, Brady & Meyer* of Manitowoc, and oral argument by *C. E. Brady.*

ROSENBERRY, J. The facts in the case were in the main stipulated, and it is argued here by the defendants that the court erred in the application of the law to the facts and in making certain inferences from admitted facts. The assignments raise two questions: First, Where is the right of way located? and second, Do the points complained of (X and Y on the diagram) constitute a material encroachment on the way?

The court found that "the strip of land in dispute is the east eight (8) feet of the north 55 feet of the west half of lot 4" and lies on the east side of defendants' premises; that is, the east line of the strip and the east line of defendants' premises are coterminous. This is a correct construction of

the language of the deed. By mutual agreement the party-wall was built to a point eight feet distant from the east line. If the deed were indefinite, which it is not, the building of the wall would determine the location.

The defendants own the fee of the land upon which the way is located and the plaintiff has an easement for travel or passage on foot and for teams and vehicles upon and over said strip. On behalf of the defendants it is argued that it was not the intention of the grantor of the easement to grant a right of way eight feet in width measured with mathematical exactness so as to preclude the grantor from inclosing his premises by a fence or wall; that the easterly line of the way is not a mathematical line, but is one having width, and that the grantor has a right to maintain in such right of way a fence or supporting walls for a structure over the right of way, and that such use by the owner of the fee is not inconsistent with the easement granted.

That the owner of the servient estate is entitled to make such use of it as he may without unreasonably interfering with the use of the dominant owner is clearly established. *Gimbel v. Wehr,* 165 Wis. 1, at p. 13, 160 N. W. 1; *Wallis v. First Nat. Bank,* 155 Wis. 306, 143 N. W. 670; *Childs v. Dahlke,* 151 Wis. 82, 138 N. W. 277, and cases cited.

The difficulty with the position of appellants is that the court found as a matter of fact, and the finding is not here attacked, that the erection of the posts which narrowed the way in one case six inches and in the other five inches did materially and substantially interfere with the enjoyment of the rights granted the plaintiff and resulted in serious and unreasonable inconvenience in the use of the way, especially by motor trucks. This is conclusive upon the rights of the parties. It does not require argument to show that obliging plaintiff to pass through a space seven feet six inches wide with a truck six feet eight inches wide is a substantial impairment of his rights.

We shall not attempt to determine or settle any other

issue than that presented upon this appeal by the facts in this case. We are urged to lay down some general rules in regard to the future use and enjoyment of these premises. This is beyond the province of the court. No one can foresee what future conditions may be, and problems relating to the future use of the premises must await solution until they arise.

By the Court.—Judgment affirmed.

BAST, Appellant, vs. SPROLL and another, Respondents.

February 7—March 14, 1922.

Contracts: Definiteness: Presumption as to rate of interest: As to time of payment: Uncertainty as to time of payment: Enforceability of contract.

1. If a written contract providing for the payment of interest does not specify the particular rate to be paid, it may be presumed that the parties contemplated the legal rate; and where nothing is specified as to the time of payment, the obligation may be considered presently due.
2. A contract wherein the owners of a farm agreed to buy certain city property for a specified amount if they could sell their farm for a certain price, and in the event of the purchase of such city property agreed to pay a portion of the price on a certain date, with no provision in the contract as to the time of payment of the balance, was not enforceable as a promissory note because of the indefiniteness as to time of payment, although the contract contained a clause that, "in case of sale of our farm as stated above, this paper will constitute a note for the above amount, $7,000, until paid, interest at the same rate as paid on the farm."

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The complaint alleged the making and signing of a written contract by the parties on May 11, 1920. It was to the effect that, on the condition that one Mr. Loessel should buy defendants' farm or that it should be sold for $13,500

or more, the defendants would buy the plaintiff's "residence and lots in St. Nazianz, Wisconsin [there being no further or other description thereof], for $7,000. Five thousand dollars cash to be paid by the 15th of June or the time the place is bought, should it be a short time after that. The balance, $2,000, will include interest at the rate of interest which is paid us on the balance on the farm."

There were other recitals as to what was included and excluded in the agreement but they are not material here.

It also provided that defendants were binding the contract by giving a $50 Liberty bond to the plaintiff, and that if the contract did not result in a sale as therein stated, then the plaintiff was to return the Liberty bond, and in case of a sale he was to return the Liberty bond when the $5,000 was paid. It also recited: "In case of sale of our farm as stated above, this paper will constitute a note for the above amount, $7,000, until paid, interest at the same rate as paid on the farm."

Further provisions of the written contract are not material here.

The complaint alleged that within the time limited by the contract the defendants did sell their farm to Mr. Loessel; that thereafter plaintiff tendered a deed of his residence and lots in the village of St. Nazianz and offered to and was able and willing to comply with all the conditions of the contract on his part required, and delivers into court the deed of his residence and lots, but that the defendants failed and refused to carry out the contract on their part. The prayer was that the defendants be directed to carry out their part of the agreement and for judgment for $7.000.

From the order of the trial court sustaining defendants' demurrer to such complaint plaintiff has appealed.

For the appellant there was a brief by *Hougen, Brady & Meyer* of Manitowoc, and oral argument by *C. E. Brady*.

For the respondents there was a brief by *Healy & Joyce,* and oral argument by *H. F. Kelley,* all of Manitowoc.

ESCHWEILER, J. Upon this appeal appellant plaintiff presents no question other than his assertion of a right to recover the sum of $7,000 mentioned in the agreement set forth in the complaint as though such were a promissory note by defendants for that amount, and states in his brief that this is not an action for specific performance but for money as upon a completed sale.

He contends that the clause in the contract, *"in case of sale of our farm as stated above, this paper will constitute a note for the above amount, $7,000, until paid, interest at the same rate as paid on the farm,"* contains all the essential elements of a promissory note and made a binding obligation on the defendants to pay that amount, the condition precedent to a sale of the farm having been performed.

This quoted sentence from the contract, however, expressly refers to other portions of the written contract, and, the whole thereof being pleaded by plaintiff, the entire contract must be considered in determining the rights and liabilities of the parties.

It is apparent that in the contract there is no specific provision as to the rate of interest to be paid on the said sum or definite time fixed when it shall become due and payable. As to the interest, the presumption might be indulged that the parties contemplated the legal rate, as held in *Schmeling v. Kriesel,* 45 Wis. 325, 327. Where nothing is specified as to the time of payment the obligation may be considered presently due, as in a demand note such as provided for in sub. (2), sec. 1675—7, Stats., or as stated in such cases as *Husbrook v. Wilder,* 1 Pin. 643; *Irish v. Dean,* 39 Wis. 562, 567; *Thompson v. Ketcham,* 8 Johns. 190; *Porter v. Porter,* 51 Me. 376; *Adams v. Adams,* 55 N. J. Eq. 42, 35 Atl. 827, dealing with promissory notes; or in accord with

the rule as to the payment of the purchase price on a sale, as in *Bartz v. Paff,* 95 Wis. 95, 99, 69 N. W. 297; *Nichols v. Ruggles,* 76 Me. 25.

The plaintiff, however, cannot support his contention that he is entitled to have the contract enforced as a promise to pay $7,000, for the reason given by the trial court in sustaining the demurrer. The contract lacks the essential element of being definite as to the time of payment. It clearly appears upon the face of the contract that the parties provided that the $7,000 obligation, if any, arising upon the sale of the farm was not to be paid as one sum. It was expressly split in two sums so far as time of payment was concerned; $5,000 was to be paid forthwith and no provision for interest on such amount contemplated or mentioned; the balance of $2,000 was to be paid at some indefinite time in the future and interest was to be paid thereon. Such latter provision manifestly includes the idea of a period during which the payment of the $2,000 is by agreement not subject to present demand as was the $5,000. Being so left indefinite in such a material particular by the parties themselves, and there being no presumption which would warrant the court in fixing any particular time as being the end of any agreed period for the recognized extension of time for the payment of the $2,000, the court cannot by its decree now make for the parties that which would have to be a new and court-made contract.

The situation here presented is clearly controlled by the cases of *Buck v. Pond,* 126 Wis. 382, 384, 105 N. W. 909; *Poole v. Tannis,* 137 Wis. 363, 365, 118 N. W. 188, 864; *Schmeling v. Kriesel,* 45 Wis. 325, 328.

A very similar situation is presented in the case of *Rahm v. Cummings,* 131 Minn. 141, 155 N. W. 201.

The trial court was therefore right in sustaining the demurrer to the complaint.

By the Court.—Order affirmed.

JOHNSON, Respondent, vs. PRIDEAUX, Appellant.

February 7—March 14, 1922.

Automobiles: Law of the road: Violation: Sudden peril caused by negligence of another: Choice of action: Complete obstruction of vision: Negligence.

1. An automobile driver who, becoming enveloped in a cloud of dust raised by a passing car, threw off his power, applied his brakes, and brought his car to a stop in thirty-six feet, was not guilty of negligence because while traveling such distance with his view completely obscured he unconsciously swerved to the left of the center of the road, where he was struck by plaintiff's car.
2. One is guilty of negligence only when he fails to exercise that care and prudence which is generally observed by the great mass of mankind under similar circumstances; but he is not guilty of negligence in unconsciously failing to obey the law of the road where it is impossible to do so by reason of circumstances over which he has no control and for which he is not responsible.
3. The driver of an automobile who by the negligence of another is suddenly placed in an emergency is not guilty of negligence if he makes such a choice of possible actions as a person of ordinary prudence placed in such a position might make, even though he did not make the wisest choice.

APPEAL from a judgment of the county court of Iowa county: ALDRO JENKS, Judge. *Reversed.*

On the 19th day of August, 1919, the defendant was driving his automobile eastward on the main road between Blue Mounds and Mt. Horeb in Iowa county. Plaintiff was proceeding westward on the same road in a Ford car. A collision occurred between these two cars about two or three hundred yards east of the viaduct over the track of the Chicago & Northwestern Railroad. The traveled portion of the highway at the point of collision was about twenty-five feet wide, and the road was of about the same width for some distance each way from the point of collision and was comparatively level and straight. On this dirt road the dust was very thick and there was no wind. West of the

viaduct the road was of macadam construction. The car driven by one Bashford was just behind the defendant's car while they were on the cement road, and both cars were then running at about twenty-five to thirty miles per hour. Just before leaving the cement road defendant saw plaintiff's car approaching from the east. Soon after entering the dirt road the Bashford car sounded its horn as a signal to the defendant that it desired to pass. Defendant then drove his car to the south side of the traveled portion of the highway and slowed down to a speed of ten miles per hour. The right wheels of the defendant's car were then about two feet from the south margin of the road. The Bashford car then turned to the left and passed the defendant, running at a speed of twenty-five to thirty miles an hour. In doing so it raised a cloud of dust so dense that it was impossible for the defendant to see where he was going. Realizing this, he at once threw off his power, applied his brake, and brought his car to a full stop in a distance of two car lengths or about thirty-six feet from where the Bashford car passed him. In going this distance he unconsciously permitted his car to swerve to the left so that when it came to a stop it was standing diagonally northeast across the center of the traveled portion of the highway with its left front fender and bumper within about five feet of the north edge of the traveled portion, while a portion of the rear part of the car was south of the center line of the road. While standing in this position, and while the dust cloud was so dense that sight was impossible, he was struck by plaintiff's car. The driver of the plaintiff's car observed the two cars approaching from the west, saw Bashford turn out and pass defendant's car, observed that defendant's car was then well to the south of the center of the highway, and then that it was hidden from view by the cloud of dust raised by the passing car. Plaintiff's car was then on the north side of the highway, just six inches or a foot from the north side of the traveled portion of the

highway, and continued in this position at a speed of six miles an hour until the collision occurred. The vision of plaintiff's driver towards the south and west was entirely obscured by the cloud of dust, but by looking down to the right he could and did see that he was keeping along the north side of the road and within a few inches of the north margin thereof. When the collision occurred the defendant could not see plaintiff's car, nor could the occupants of plaintiff's car see the defendant's car, and none of them knew what had occurred for a few moments.

The case was commenced in justice's court by the plaintiff to recover damages resulting to his car. The defendant counterclaimed for damages sustained by his automobile. The case was appealed to the county court, where it was tried without a jury, and upon the facts found by the court, as above set forth, judgment was rendered in favor of the plaintiff and against the defendant, from which judgment the defendant appealed.

For the appellant there was a brief by *James E. O'Neill* of Dodgeville, attorney, and *E. E. Brossard* of Madison, of counsel, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *Gettle & Torge* of Madison, and oral argument by *A. T. Torge.*

OWEN, J. The appellant contends that the judgment should be reversed with instructions to render judgment dismissing the plaintiff's complaint. The right to recover upon the counterclaim does not seem to be insisted upon. We are therefore called upon to consider only whether the judgment rendered against the defendant can be supported upon the facts found by the county court.

It seems that the county court convicted the defendant of negligence because he was on the left-hand side of the road, contrary to the statute. He gave no weight to the fact that the defendant's vision was completely obscured by the dense cloud of dust and that he was utterly unable to see

where he was going. The finding of the court is that upon becoming enveloped in this cloud of dust "he at once threw off his power, applied his brake, and brought his car to a full stop in a distance of two car lengths or about thirty-six feet from where Bashford's car had passed him. In going this distance he *unconsciously* permitted his car to swerve to the left." He was therefore found guilty of negligence for doing that which he could not avoid doing. In defendant's situation it was utterly impossible for him to see where he was going, and entirely beyond his power to know that he was veering to the left side of the road. It was just as impossible for him to control the car in this respect as though he had been suddenly stricken with blindness or had suffered an apoplectic stroke. It is plain that the decision of the trial court held him to an impossible degree of care, owing to the complete obstruction of his vision by the dust. The court applied to him the same rule that would obtain if his vision was not obscured.

One is guilty of negligence only when he fails to exercise that care and prudence which is generally observed by the great mass of mankind under the same or similar circumstances. While the law requires the driver of an automobile to keep to the right when meeting another vehicle, one cannot be held guilty of negligence in unconsciously failing to do so where that is impossible by reason of circumstances over which he has no control and for which he is in no sense responsible. The defendant was confronted by an emergency which was not created by his own negligence, and in that emergency it would seem that he did the most prudent thing possible in bringing his car to an immediate stop. We apprehend that no more prudent action under the circumstances could be suggested, and it would be an anomaly to hold one guilty of negligence who acts with the care and prudence exercised by the defendant under the circumstances then confronting him.

In a note to be found in 6 A. L. R. at page 680, the general proposition is stated that "an automobile driver, who

by the negligence of another and not by his own negligence is suddenly placed in an emergency and compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he did not make the wisest choice." The defendant is well within this rule, and this principle alone, without any other consideration, requires a reversal of the judgment with instructions to dismiss the plaintiff's complaint.

It therefore becomes unnecessary to consider plaintiff's negligence. But we cannot refrain from suggesting that if he had acted as did the defendant, this accident would not have occurred; and it is also to be remarked that by proceeding at a time when he was utterly unable to see anything ahead of his car he was brought within the reason and spirit of the rule announced in *Lauson v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629. Whether the fact that the driver was able to see the edge of the road and thus keep on the right side relieves the plaintiff from the consequences of the rule of the *Lauson Case* need not be considered.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment dismissing plaintiff's complaint.

HIND, Respondent, vs. THOMAS, Appellant.

February 7—March 14, 1922.

Sales: Warranties: Nondisclosure of latent defect: Question for jury: Reliance upon representations: Evidence: Value of horse if sound: Appeal: Objections to form of special verdict.

1. The question whether the seller of a horse, expressly or by implication, warranted it to be all right and not spavined, is for the jury.
2. Under some circumstances the intentional nondisclosure of a latent defect by a seller may avoid a sale though there is no warranty.

3. In an action for the purchase price of a horse, where the defense was that the horse was spavined and that plaintiff had represented it to be all right, testimony that the horse, if sound, would have been worth from $220 to $275 in the market was relevant to the question whether defendant relied on any representations made at the time he bought the horse for $147.50.
4. An objection that the issues submitted in a special verdict were not in proper form could not be raised for the first time on appeal.
5. Where defendant's counterclaim was not sustained, his objection to the admission of evidence for the purpose of minimizing damages on the counterclaim will not be considered on appeal.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Iowa county: L. H. BANCROFT, Circuit Judge. *Affirmed.*

Action to recover $147.50, the purchase price of a mare sold to defendant by plaintiff at a certain auction sale in Iowa county.

Defendant admitted that he bought the mare, but alleged that the sale was conditioned on a warranty that the horse was sound, and that in due time he rescinded the sale because the mare was spavined, and attempted to return her, but was forced to keep her by plaintiff. By way of counterclaim defendant alleged there was due him $122.75 for fourteen months' care of the mare.

The auction was held on plaintiff's farm. After several horses had been sold the mare in question was brought out. There was evidence tending to show that the bidding was very slow; that the auctioneer called upon plaintiff to say what was the matter with the animal; that thereupon plaintiff stated that the mare's legs were stocked, or swollen, by reason of her standing in the barn without exercise; that the swelling was due partly to a kick; and that her hock-joints were slightly enlarged. Defendant's witnesses testified that when the auctioneer called on the plaintiff he stated that the mare was all right; that the swollen legs "would

come out all right," and that there was nothing wrong with her. Plaintiff's witnesses stated that plaintiff guaranteed the mare as to her wind, "but not otherwise."

It is undisputed that plaintiff was aware of the spavins. Defendant heard the auctioneer say that horses could be tried out on the farm, but that once taken on the road they belonged to the buyer. Two weeks after the sale defendant took the mare to the farm of plaintiff, who refused to take her back.

Over the objection of defendant, plaintiff was allowed to introduce testimony tending to show that, had the mare been sound, her value would have been greatly in excess of the auction price; also that shortly after the sale plaintiff told defendant of a prospective purchaser who would pay the auction price for the mare. Plaintiff requested a finding as to whether defendant had an offer to sell the mare for the same price as he paid for her, which request was refused.

In a special verdict the jury found that plaintiff did not represent the mare to be all right; that defendant relied on no such representation; and that the fair compensation for the care of the mare was $119. Judgment was entered in favor of plaintiff for the amount of his claim and the counterclaim was dismissed. From this judgment defendant appealed.

For the appellant there was a brief by *Kopp & Brunckhorst,* and oral argument by *E. E. Burns,* all of Platteville.

For the respondent there was a brief by *Fiedler, Fiedler & Jackson* of Mineral Point, and oral argument by *R. T. Jackson.*

JONES, J. The nature of the defense relied on by defendant is found in the following allegation of the answer:

"That at said sale, when the horse in question was on the block, the auctioneer, plaintiff's agent, represented and warranted that while the said animal had swollen legs they

were entirely from non-use, and that anybody purchasing was safe in so doing; that the owner guaranteed and warranted that the said legs would 'come all right,' and that the horse was sound in every respect."

The following was the first question in the special verdict: "Did the plaintiff at the time of the sale represent this horse to be all right except for the swelling of the hind legs caused from standing in the barn?" To which the jury answered "No."

The next question was, "Did the defendant rely upon these representations at the time he bought in the horse at such sale?" To which the jury answered "No."

It will be seen that one of the main issues made by the pleadings was whether there was an express warranty and that this claim was negatived by the verdict. It is now claimed by defendant's counsel that by reason of concealment and deceit there was an implied warranty.

It is doubtless true that under some circumstances the intentional nondisclosure of a latent defect by the seller may avoid a sale though there is no warranty. *Dowling v. Lawrence,* 58 Wis. 282, 16 N. W. 552; 26 Corp. Jur. 1074, 1075.

The question is whether, under the facts of this case, it was the duty of the court to set aside the verdict of the jury because the defendant did not make full disclosure of all the facts known to him.

The Wisconsin cases principally relied on by defendant are *Dowling v. Lawrence,* 58 Wis. 282, 16 N. W. 552; *Schauer v. Bodenheimer,* 150 Wis. 550, 137 N. W. 785; *Giffert v. West,* 33 Wis. 617; *Brillion L. Co. v. Barnard,* 131 Wis. 284, 111 N. W. 483.

In the first of these cases there was direct evidence of an express warranty, and the judgment was reversed because of error in rejecting evidence on that subject.

The second was an action for deceit on false representation that the mare had an ailment of little consequence, while in fact she had mange, a much more serious disease.

Some of the questions in the special verdict were answered in the buyer's favor, but the jury disagreed on the question whether the seller deceitfully failed to inform the buyer of the facts. The court, notwithstanding this fact, entered judgment for the buyer. The seller's counsel had proposed a question whether the buyer relied on the representations made, and the request was denied. It was held by this court that whether the buyer relied on the representations made and whether the concealments induced the purchase were clearly questions for the jury.

The third case above cited related to the purchase of a note, and the fourth is to the effect that, if a person undertakes to give information to one who is about to enter into a contract of suretyship relative to the hazards which may arise, he must make full disclosure.

In *Smith v. Reed,* 141 Wis. 483, 124 N. W. 489, cited by respondent's counsel, the buyer relied on a warranty. The jury found that the seller represented that the horse was all right but did not say he would guarantee that it was all right. The jury found that the horse was diseased but that the buyer did not rely on the representation. It was held in this court that the burden of proof was upon the party alleging the warranty, that the representation did not amount to a warranty unless relied on, and that the question whether the representation was relied on was for the jury.

It is argued by defendant's counsel with much earnestness that the statement made by plaintiff was "half truths" and well adapted to deceive. On the other hand, it is argued by plaintiff's counsel that the refusal to make any warranty except that the mare was "sound in the wind" negatived any inference of an implied warranty and that the defects were not latent, since it was evident that the legs of the mare were swollen and the plaintiff stated that the hocks were enlarged and that she had been kicked.

The Century Dictionary defines spavin as "a disease of horses affecting the hock-joint, or joint of the hind leg

between the knee and the fetlock." All these matters were doubtless presented to the jury by able counsel, and they found that there was no warranty and no reliance on the representations made.

It may be that jurors would be as suspicious of an "enlarged hock" as of a spavin, and we cannot say but the jury were justified in finding that the defendant had notice, or sufficient facts to give notice, of the defects complained of.

It is argued that "ethics of the horse trade, as every practical lawyer must take professional notice, are not up to the legal requirements concerning fair dealing. There is a strong lingering tendency to applaud every act of deception, including plain falsehood, and to deride the victim for his credulity. This custom, which arose out of matching of wits in the exchange of hacks, readily extends to the legitimate sale for money consideration, and must account for many surprises in verdicts concerning horse deals," and the inference is drawn that the courts should disregard the verdict of the jury and grant a new trial.

There may be more truth than poetry in this characterization of the ancient profession of horse trading, but we know of no better tribunal for determining the facts in a deal relating to horseflesh than the average jury.

One of the assignments of error was the admission of testimony as to the value of the mare if she had been sound. Defendant bought her for $147.50. There was testimony that if sound she would have been worth from $225 to $275 in the market. This testimony was relevant to the question whether defendant relied on the representations made, and similar evidence was sanctioned in *Schauer v. Bodenheimer,* 150 Wis. 550, 137 N. W. 785.

Objection is made by appellant's counsel because the court refused to receive evidence offered by them that the general scale of prices at the sale was low. We consider that such evidence was irrelevant and was properly rejected.

Objection is made by appellant's counsel that the court in its instruction regarding the second question, the one relating to reliance on the representation, erred in unconditionally submitting it to the jury. This amounts to an objection to the form of the special verdict, and the point is raised that if the question as to the representations was answered "No," it would logically follow that the answer to the next question would be "No."

In the instructions the jury were told to answer each question "Yes" or "No" as they should be convinced by the preponderance of the testimony. No other questions were proposed by counsel for either party. No exception was taken to the substance or form of the questions.

The usual motions were made to change the answers to these two questions and to direct judgment for defendant, and, if the motions were denied, for a new trial on the grounds that the verdict was contrary to the evidence and because improper testimony was received.

The two main issues in the case were submitted in the special verdict and answered. If they were not submitted in proper form, it is now too late to raise the objection for the first time. *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166; *Stiles v. Neillsville M. Co.* 87 Wis. 266, 58 N. W. 411; *Dolphin v. Peacock M. Co.* 155 Wis. 439, 144 N. W. 1112; *Ludvigson v. Superior S. B. Co.* 147 Wis. 34, 132 N. W. 621.

Objection is also made because the court admitted evidence of the offer made by a third party, after the sale to defendant, to pay defendant for the mare as much as he had paid. This evidence was given only for the purpose of minimizing damage on defendant's counterclaim, and, since the counterclaim is not sustained, this objection as well as some others raised by respondent's counsel do not require discussion.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). When at the time of the sale the plaintiff undertook to state the condition of the horse's legs, I think he was legally and morally bound to tell the whole truth. His then statement, while knowing of the existence of the serious defect not disclosed, should be held to amount to an assertion that there was no other defect than the one he specifically mentioned. His concealment of the other material fact ought to be considered, under the facts disclosed, fraud, as a matter of law.

KESSLER, Respondent, vs. REESE, Appellant.

February 8—March 14, 1922.

Lost instruments: Payment: Presumption: Burden of proof.

In an action against a surety on a lost note, where the provisions of secs. 4190 and 4191, Stats., were complied with, and the answer of the defendant admitted that the note was lost, the burden of establishing the defense of payment was upon the defendant, the same as if the note had in fact been produced.

APPEAL from a judgment of the circuit court for Iowa county: L. H. BANCROFT, Circuit Judge. *Affirmed.*

Promissory note. The complaint alleges that the defendants, in renewal of a prior note, made and delivered to the plaintiff their promissory note whereby they promised to pay to the order of the plaintiff, on or before April 6, 1914, the sum of $500 with interest thereon at the rate of six per cent. per annum payable annually; that the interest on said note was paid to April 6, 1914, but that no part of the principal has been paid; that no proceedings have been had for the collection of said note; and that the plaintiff is now the lawful owner and holder thereof.

It is further alleged that in the month of August, 1914, one of the defendants, *Elmo B. Reese,* requested the plaint-

iff to leave with him for safe keeping several securities, including the note executed by the defendants to plaintiff; that some time thereafter she demanded the return of said securities; that the said *Elmo B. Reese* gave her a package of papers, and thereafter she missed the note executed by the defendants; that the plaintiff has made diligent search for the note but is unable to find it, and that the said note is lost. That the plaintiff has never sold, assigned, or transferred the note to any one, and that no person has any right or title thereto, and that there was owing thereon the principal sum of $500 with interest at six per cent. per annum from April 6, 1914.

The defendant James T. Reese was not served and did not appear.

The defendant *Elmo B. Reese,* for answer to the plaintiff's complaint, denied each and every allegation in the complaint contained except as specifically admitted. The defendant admitted that on November 22, 1906, he signed a note as security for the defendant James T. Reese, payable to the plaintiff two years from said date, for the sum of $500. The defendant further admitted that after said note fell due he signed a renewal thereof as security for James T. Reese, such renewal note being for the sum of $500 with interest at six per cent., due April 6, 1914, which last mentioned note was accepted by the plaintiff in lieu of and in payment of the note first above described. Defendant further admitted that no proceedings have been had for the collection of the last described note.

The defendant admitted that in the month of August, 1914, the plaintiff left in his safe a package, denies that he had any knowledge of the contents thereof, and that the plaintiff thereafter called for the said package and it was returned to her, unopened, in the same condition in which it was received.

For a second defense *Elmo B. Reese* alleged that he was informed on or about April 6, 1914, that the said note for

$500 had been fully paid, and the answering defendant further alleged payment of said note by James T. Reese on the 6th day of April, with further allegations as to subsequent transactions, and an allegation that by reason of the failure of the plaintiff in collecting or attempting to collect the said note, and permitting the defendant *Elmo B. Reese* to remain in ignorance of her claim, he is no longer in a position to protect himself from loss as he would have been had reasonable notice been given by the plaintiff.

Upon the trial the jury found a general verdict in favor of the plaintiff, and assessed her damages at the sum of $500 with interest thereon at six per cent. per annum from April 6, 1914. The defendant moved to set aside the verdict and for a new trial on account of errors committed by the court in his instructions to the jury, and because the verdict of the jury was contrary to the law and evidence. Judgment was entered accordingly, from which the defendant *Elmo B. Reese* appeals.

M. J. Briggs of Dodgeville, for the appellant.

For the respondent there was a brief by *Fiedler, Fiedler & Jackson* of Mineral Point, and oral argument by *R. T. Jackson.*

ROSENBERRY, J. The defendant complains of the following instruction: "In this case the defendant, in order to sustain the issue upon his part, must convince the jury by a preponderance of the evidence that the note has been paid." It is urged on behalf of the defendant that the burden of proving by a preponderance of the evidence that the note was in fact lost, and of rebutting the presumption that the note had been paid, which arises from its nonproduction, was upon the plaintiff. Citing *Bergen v. Urbahn,* 83 N. Y. 49; *Ward v. Munson,* 105 Mich. 647, 63 N. W. 498.

The infirmity of the argument made by the defendant consists in this: that by the allegations of the answer the

loss of the note is admitted and consequently there was no burden upon the plaintiff under the pleadings to establish that fact by a preponderance of the evidence. In the cases cited and relied upon by the defendant there was a failure to produce the negotiable instruments, and no evidence was offered that they were lost or that search had been made therefor, and an entire failure to account for the loss. Those cases are clearly distinguishable from this. Here the loss of the note was alleged in the plaintiff's complaint, which allegation was specifically admitted by the answer.

By the terms of sec. 4190, Stats., upon proof of a lost instrument under the circumstances there described, the party making proof "shall be entitled to recover the amount due thereon as if such note or bill had been produced." The bond required by sec. 4191 was in this case given, and the provisions of sec. 4190 were complied with. The right of the plaintiff to recover was therefore complete unless payment of the note was shown by the defendant. Under familiar rules the burden of establishing payment was upon the defendant.

The defendant argues at considerable length that the evidence is insufficient to sustain the verdict. We have carefully reviewed the evidence and shall not attempt to set it out at length, but are of the opinion that a jury issue was presented.

By the Court.—Judgment affirmed.

GENSKE, Appellant, vs. VEITH and others, Town Supervisors, Respondents.

February 8—March 14, 1922.

Highways: Deviations between proposed and actual course: Changes in route at request of landowner: Estoppel.

Where a landowner was present when town supervisors laid out a highway, suggested several changes in its course over his premises, which were made, assisted in staking it out, and did not object thereto except as to damages, and at the trial of his action to enjoin opening the highway objected to evidence as to his participation in selecting the route because it affirmatively appeared that it had been laid out in accordance with the petition, he could not be heard to assert any claim on account of deviations of the highway as laid out on his lands from the route described in the petition and notice.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The complaint alleged that the plaintiff was the owner of a certain farm in the town of Sheldon, Monroe county, Wisconsin; the defendants were the supervisors of said town. An application was made to them in March, 1919, as such supervisors for the laying out of a public highway in said town, a substantial part of which was proposed to be located upon plaintiff's farm; notice was duly given of the hearing of such application and thereafter an order made by such defendants on April 3, 1919, purporting to lay out such a highway, and also an award of damages to the plaintiff and others for such laying out of the highway. That after having notified the plaintiff to remove the fence and other obstructions maintained by him upon that part of such highway that was on his land and plaintiff's refusal to comply with such order, the defendants threaten and give out that they will remove such obstructions and throw open to public travel such alleged highway. Other allegations are made not material here.

The plaintiff prayed for judgment restraining the defendants from attempting to take any part of plaintiff's premises or interfering with his use thereof or from trespassing thereon.

The answer asserted that the proceedings were duly and regularly had for the laying out of the highway referred to in the complaint and that the plaintiff consented to the laying out of the highway as described in the order therefor, and that because of plaintiff's consent and proceedings with reference to the location of said highway he is estopped from asserting any invalidity in the order for the laying out of the same.

Upon the trial the court found, in substance, that the highway described in the order by defendants of April 3, 1919, was substantially the course referred to and described in the application therefor and the notice of hearing thereof; that the deviation in the course of the highway as specified in the order from the course described in the application and notice was made at the direction and with the consent of the plaintiff; that the description of the proposed highway in the petition, notice, and order therefor is with such certainty that it may be definitely located.

As conclusions of law the court found that the proceedings for the laying out of the highway were in all respects valid and that the defendants are entitled to judgment dismissing the action with costs.

From a judgment entered in accordance therewith the plaintiff has appealed.

Thorwald P. Abel of Sparta, for the appellant.

R. B. Graves of Sparta, for the respondents.

ESCHWEILER, J. The highway in question was laid out to permit the owner and occupant of a farm lying just west of plaintiff to obtain access to a public highway then existing near the southeast corner of plaintiff's premises. On account of the hills encountered and the nature of the sur-

face the highway took quite a roundabout course, and in a general way first to the northeast, then on a curve in an easterly direction, then southeasterly with several curves, then south, and finally to the southwest, and almost all of it over plaintiff's farm.

The only alleged error now presented to us by plaintiff is to the effect that there were such substantial variations between the description of the highway as proposed in the application for the same from that in the published notice fixing the time and place of the hearing of such application and from that in the final order and as the same was staked out or marked upon the ground, and such indefinite terms in the several documents used, as made the proceedings defective.

We do not deem it necessary to detail the specific criticisms made by plaintiff upon these proceedings. The descriptions were sufficiently certain and definite to be within the rule established in prior holdings of this court. *Jackson v. Rankin,* 67 Wis. 285, 30 N. W. 301; *State ex rel. Milwaukee, L. S. & W. R. Co. v. O'Connor,* 78 Wis. 282, 47 N. W. 433; *State ex rel. Gottschalk v. Miller,* 136 Wis. 344, 348, 117 N. W. 809; *Schillock v. Jones,* 147 Wis. 119, 122, 132 N. W. 908; *State ex rel. Ronglien v. Clemenson,* 148 Wis. 268, 270, 134 N. W. 403.

The plaintiff was present at the time the supervisors made their determination as to the laying out of the highway. He participated in the proceedings and suggested several changes in the line of the highway as it went over his own premises and such changes were made to better suit his convenience, and he personally assisted the supervisors in staking out such highway. He at no time made any objection to the laying out of such highway other than upon the question of damages.

Furthermore, on the trial when one of the defendants was being examined and asked to state what part plaintiff took in directing the course of the road and what he then

said in regard to it, an objection was interposed by plaintiff's counsel to such question on the ground that it was immaterial "because it appears affirmatively that they laid out the road in accordance with the petition."

It is plain, therefore, that plaintiff ought not to be heard in this action of trespass to assert any claim on account of any deviations of the highway as ordered laid out upon his lands by reason of his actions at the time of the hearing and determination by the defendants (*State ex rel. Milwaukee, L. S. & W. R. Co. v. O'Connor,* 78 Wis. 282, 287, 47 N. W. 433), and on account of his express recognition on the trial below of the correctness of the proceedings.

By the Court.—Judgment affirmed.

KNOBEL and another, Respondents, vs. J. BARTEL COMPANY, Appellant.

February 8—March 14, 1922.

Sales: Defective goods: Reasonable time for rejection: Acceptance: Retention without objection: Acts of ownership: Question for jury: Local custom.

1. Under sec. 1684*t*—47, Stats., entitling a buyer to a reasonable opportunity for ascertaining whether goods sold are in conformity with the contract, and sec. 1684*t*—48, providing that the buyer is deemed to have accepted the goods when, after the lapse of a reasonable time, he retains them without intimating that he has rejected them, where defects in plush coats purchased by defendant could have been easily discovered without close inspection and were noticed when the coats were unpacked by persons having experience in handling such goods, the absence from the buyer's store of the head of the department, who had more experience in examining goods, was not sufficient excuse for their retention for twenty-five days without objection.
2. Where the defects were obvious and noticed when the coats were unpacked, but the buyer attached its regular store tags, hung them up in the store, and attempted to remedy the defects by a steaming process, its manner of dealing with

the goods was inconsistent with the ownership of the seller within sec. 1684*t*—48, Stats., relative to acceptance.

3. What is a reasonable time for acceptance of goods by a buyer is usually a question for the jury, but the goods may be retained for so long a time without objection that a court can say as a matter of law that they have been accepted.
4. In an action for the price of goods sold to a dealer with a counterclaim for defects involving the question whether they were accepted, evidence of a custom in the city where the buyer had its store as to unpacking goods to prevent disfigurement and crushing, and as to the time when the retail trade in such goods commenced, was properly excluded in the absence of evidence or of an offer to show that the seller knew of it or that it was so well established, uniform, and notorious that the parties must be presumed to have known it and to have contracted in reference to it.
5. Where the defects in the coats were obvious and noticed by the buyer within twenty-four hours after delivery, whether twenty-five days was a reasonable time for the inspection and return of the goods was the ultimate question to be determined by the jury or the court and was not a proper subject for expert testimony.
6. Under sec. 1684*t*—49, Stats., providing that if, after acceptance of goods, a buyer fails to give notice of the breach of any promise or warranty within a reasonable time after he knew or ought to have known of the breach, the seller will not be liable, the reasonable time within which a buyer was required to make a claim for damages commenced to run when it knew or ought to have known of defects in the goods.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

In April, 1920, defendant gave plaintiffs a written order for ladies' plush coats to be shipped from plaintiffs' factory in New York City about August 15th, the total price being $2,174.75. The order was accepted; the goods were shipped on August 12th and reached defendant's store in La Crosse August 17th.

By mistake two or three extra garments, not ordered, were included. When the goods came, the head of the department, Miss McGuinn, was ill in the hospital and she did not return until September 11th. After the goods

came they were unpacked and hung up. When they were unpacked the president of defendant and two clerks were present and there was full opportunity to see the defects, if any. One of the clerks, Mrs. Cole, had had ten years' experience in handling and selling plush coats. She then saw the defects and spoke of them.

On August 18th the secretary of defendant checked the coats with the invoice, attached the regular store tags giving cost and selling price to each garment, and hung them up in the store. She also noticed at that time the defects. On the same day she wrote to plaintiffs acknowledging receipt of the coats and asked reduction in price because, she claimed, there had been a decline in the market price. There was no objection in the letter to the quality or the quantity of the goods. On August 24th plaintiffs replied declining to make the reduction.

The defects complained of were that the garments were streaked, had creases, and were matted, that is, that the fiber was pressed down. Defendant used a steaming process trying to remedy the matted condition, but was not successful. It is claimed by defendant that there was no adequate examination of the goods until the return from the hospital of Miss McGuinn, and that she was the only person who, by the course of business, was charged with the duty of making the examination. On September 11th the defective garments and the three extra coats were returned to plaintiffs with a check for $1,783.75, being for the amount defendant admitted to be in good condition. Plaintiffs refused to accept this amount.

The court submitted a special verdict on defendant's counterclaim for defective goods. The jury found that there were defects and that the goods were depreciated to the amount of $196.81, but that defendant did not make a claim for damages within a reasonable time after it knew or ought to have known of the defects.

By stipulation the goods were returned to defendant and

the action was brought to recover for the stipulated price, including that of the extra garments. Judgment was entered for the price of the goods in the hands of defendant, without deduction of the $196.81, and for the amount of the claim.

For the appellant there was a brief by *Cowie & Hale* of La Crosse, and oral argument by *Quincy H. Hale.*

For the respondents there was a brief by *McConnell & Schweizer* of La Crosse, and oral argument by *J. E. McConnell.*

JONES, J. It is the first assignment of error that the court held as a matter of law that the buyer accepted the goods by holding them twenty-five days without notifying the seller that the goods were rejected, and in directing a verdict for plaintiffs.

Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless he has had a reasonable opportunity for examining them for the purpose of ascertaining whether they are in conformity with the contract. Sec. 1684*t*—47, Stats. By sec. 1684*t*—48, Stats., it is provided:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

The court based his ruling that there had been an acceptance on the grounds, first, that the action of defendant was inconsistent with the ownership of the goods by the plaintiffs, and second, that it delayed for an unreasonable time in giving notice of the refusal to accept.

It was undisputed that the defects claimed were of such a nature that they could be easily discovered without very

close inspection, and that they were noticed when unpacked by persons having experience in handling such goods. Defendant not only made no objection to the quantity or quality of the goods for twenty-five days, but did promptly object on other grounds which were not tenable. Under such circumstances, the absence from the store of another person who may have had more experience in examining goods did not afford sufficient excuse for the retention of the goods for so long a period without objection. We also agree with the trial judge that the manner of dealing with the goods was inconsistent with the ownership of the seller.

It is true that what is a reasonable time for acceptance is usually a question for the jury, but the time may be so long that a court can and should say as a matter of law that the acceptance has been made. *J. L. Owens Co. v. Whitcomb*, 165 Wis. 92, 160 N. W. 161; *J. B. Bradford P. Co. v. Baal*, 166 Wis. 134, 164 N. W. 822; *Fort Wayne P. Co. v. Hurley-Reilly Co.* 163 Wis. 179, 157 N. W. 773; *Hiltgen v. Biever*, 162 Wis. 315, 156 N. W. 132; *Kelsey v. J. W. Ringrose N. Co.* 152 Wis. 499, 140 N. W. 66; *Northfield Nat. Bank v. Arndt*, 132 Wis. 383, 112 N. W. 451. In most of the cases which have arisen in this state the sales were of machinery or articles where time might be necessary for making tests. For still stronger reasons the rule declared in such cases should apply in the instant case where the defects were plainly in sight.

The defendant's counsel made the following offer:

"The defendant offers to prove by the witnesses Mrs. Cole, Miss Bartel, and Mr. Pruess that each of these witnesses is engaged in the business of buying, selling, and dealing in ready-to-wear cloaks, such as are described in the pleadings herein, and are familiar with the customs of the trade in the city of La Crosse; that it is the custom, and was such custom on the 17th day of August, 1920, to purchase such goods in the market in the spring of the year for delivery in the early fall, and that it was also the custom, when such goods were delivered, to unpack them to

prevent disfigurement and crushing of the goods, and to hang them on racks and in bins, and that the retail trade in such garments did not commence until the latter part of October."

It will be observed that this was an offer to prove a local custom or trade in the city of La Crosse. There was no offer to prove that the custom was known to the plaintiffs or other dealers outside the city or in distant states. We have statutes which determine the rights and duties of parties in sales of this character, and the terms of the statute should not be lightly set aside. Before evidence of such a custom as may be inconsistent with the statute is received there should at least be compliance with the general rules which govern the admission of testimony to establish the custom or usage. In speaking of an alleged custom it was said in an early case:

"It is not readily adopted by courts, and the proof of such usage must be clear and explicit, and the usage so well established, uniform, and so notorious that the parties must be presumed to know it, and to have contracted in reference to it." *Power v. Kane,* 5 Wis. 265, 268; *Lemke v. Hage,* 142 Wis. 178, 181, 125 N. W. 440; *Brunnell v. Hudson S. M. Co.* 86 Wis. 587, 57 N. W. 364; *Hinton v. Coleman,* 45 Wis. 165.

The offer was also made to prove by experts that twenty-five days was a reasonable time for the inspection and return of the goods. This was the ultimate question to be determined by the jury or the court, and under the circumstances was not a proper subject for expert testimony. It required no expert knowledge to determine whether twenty-five days was a reasonable time to hold goods without making objection when the defects claimed were obvious and known within twenty-four hours. *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 565, 106 N. W. 1081; *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777; *Johnson v. Highland,* 124 Wis. 597, 102 N. W. 1085; *Lounsbury v. Davis,* 124

Wis. 432, 102 N. W. 941. This case does not come within that class where opinion evidence as to the ultimate fact may be given by experts in regard to matters of science, art, or skill in some particular calling when based upon a hypothetical question made up of facts beyond dispute; being the class of cases mentioned in *Benson v. Superior Mfg. Co.* 147 Wis. 20, 132 N. W. 633.

Defendant's counsel assign as error the submission to the jury of the question whether defendant made claim for damages within a reasonable time after it knew or ought to have known of the defects. By the terms of the statute, "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor." Sec. 1684*t*—49, Stats.

It is urged that by the terms of the statute the buyer has a reasonable time after "acceptance" to present his claim for damages, not merely a reasonable time after "delivery." This is undoubtedly true; but the trial judge held that the reasonable time within which defendant was required to make claim for damages commenced to run when it knew or ought to have known of the defects complained of. The proof evidently satisfied the jury and the trial court that the defects were known to defendant within a very short time after August 17th, and that to wait until September 11th was an unreasonable delay. This court had under consideration the statute now relied on by appellant in *Chess & Wymond Co. v. La Crosse B. Co.* 173 Wis. 382, 181 N. W. 313, and it tends to support the view taken by the trial court, with which we agree.

By the Court.—Judgment affirmed.

TETLEY, SLETTEN & DAHL, Appellant, vs. ROCK FALLS MANUFACTURING COMPANY, Respondent.

February 8—March 14, 1922.

Corporations: Service on foreign corporations: Service on agent engaged in interstate commerce: Continuous course of business in state.

1. An appeal lies from an order setting aside the service of a summons, but not from one refusing to set aside the service, in which case a judgment must first be entered and the order reviewed on appeal from the judgment.
2. Jurisdiction of a foreign corporation by the service of process on an agent in the state cannot be acquired unless it can be deemed that such agent at the time of such service brought the corporation into the state and unless the presence of such agent within the state amounts to the presence of the corporation.
3. The mere presence of an agent in the state while not transacting business for the corporation, as where he conducts business of his own, is not sufficient to give the court jurisdiction by service on such agent.
4. To acquire jurisdiction by service on an agent, a foreign corporation must be actually doing business within the state.
5. Jurisdiction of a foreign corporation may be acquired by service on an agent who, although transacting purely interstate commerce in this state for four years, continuously solicited orders for the defendant, accepted plaintiff's check, cashed it, and transmitted the proceeds to the defendant.

APPEAL from an order of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Plaintiff, a Wisconsin corporation, sued defendant, an Illinois corporation not engaged in business in Wisconsin, for the recovery of the sum of $566, part purchase price of a hearse manufactured by the defendant. At the time the contract for the hearse was entered into and for a period of four years prior thereto, one A. W. Hanson, residing at Manitowoc, Wisconsin, acted as the agent of the defendant in this state to procure orders for the purchase of defendant's hearses upon a commission basis. Contracts, when

procured by the agent, were signed by the purchasers and by the defendant, by its agent, and transmitted to the defendant's home office in Illinois for approval. This was also done in the instant case, and in fact the contract contained a provision making it subject to the approval of the defendant. Beneath the signatures of the parties there was added a provision for an allowance of $21.50 to the plaintiff to cover expenses in inspecting a certain hearse at Beloit, Wisconsin. When the contract was signed, plaintiff in part payment delivered to the agent a check on a La Crosse bank for $566, payable to the defendant, which check the agent indorsed and thereupon received the cash, which he transmitted to the defendant. Upon the claim that certain misrepresentations were made by the agent at the time of the sale, plaintiff commenced this action against the defendant for the recovery of the part purchase money paid, and the summons was served upon said Hanson while at his home in the city of Manitowoc.

The defendant appeared specially in the action and moved to set aside the service of the summons for the reason that the court did not obtain jurisdiction of it by such service, and because said Hanson at the time of such service did not have charge of and was not conducting any business for it in this state. The circuit court granted defendant's motion, and this appeal was thereupon taken by plaintiff.

For the appellant there was a brief by *Cowie & Hale* of La Crosse, and oral argument by *Quincy H. Hale.*

For the respondent the cause was submitted on the brief of *Lees & Bunge* of La Crosse.

DOERFLER, J. The provisions of the statutes involved are the following:

"Section 2637. Actions against corporations shall be commenced in the same manner as personal actions against natural persons. The summons and the accompanying complaint or notice aforesaid shall be served, and such service

held of the same effect as personal service on a natural person, by delivering a copy thereof as follows: . . .

"(13) If against any other foreign corporation, to any such officer being within the state, or to any agent having charge of or conducting any business therefor in this state. . . ."

Defendant's counsel raise the question of the appealability of the order setting aside the service. The setting aside of the service of a summons, if no further proceedings be had thereafter, puts an end to the action, and it is therefore clear that an appeal lies from such order. *State ex rel. Drury v. Town Supervisors,* 67 Wis. 274, 276, 30 N. W. 360. Such an order is materially different from an order denying a motion to set aside a service. In the latter case a judgment must first be entered, and the order is then reviewable on an appeal from the judgment. *Latimer v. Central E. Co.* 101 Wis. 310, 77 N. W. 155; *Welsher v. Libby, McNeil & Libby,* 106 Wis. 291, 82 N. W. 143; *Heinemann v. Pier,* 110 Wis. 185, 85 N. W. 646; *Hammond-Chandler L. Co. v. Industrial Comm.* 163 Wis. 596, 158 N. W. 292.

Appellant contends that Hanson, at the time of the service of the summons, had charge of or was conducting business for the defendant, and was therefore a proper person upon whom to serve the summons, so as to give the court jurisdiction of the defendant under the provisions of sec. 2637, Stats., above referred to.

It was held in *Fond du Lac C. & B. Co. v. Henningsen P. Co.* 141 Wis. 70 (123 N. W. 640) at p. 72:

"It is of course true that the courts of this state cannot acquire jurisdiction over persons not present in the state, except for the purpose of adjudicating with reference to property or status here located. This is an inherent limitation upon the power and jurisdiction of the state under our form of government, and cannot be escaped by reason of local statutes declaring such power."

Jurisdiction of a foreign corporation by service of process upon an agent cannot be acquired unless it can be deemed that such agent at the time of such service brought the corporation into the state, and unless the presence of such agent within the state amounts to the presence of the corporation. The mere presence of an agent of a foreign corporation in this state while not transacting business for the corporation, as for instance where he conducts business of his own, is not sufficient to give the court jurisdiction over the corporation. *Goldey v. Morning News,* 156 U. S. 518, 520, 15 Sup. Ct. 559; *Conley v. Mathieson A. Works,* 190 U. S. 406, 23 Sup. Ct. 728. Each case must depend upon its own facts, and their consideration must show that the essential requirement of jurisdiction has been complied with and that the corporation is actually doing business within the state. *Kendall v. Orange Judd Co.* 118 Minn. 1, 136 N. W. 291.

In *International H. Co. v. Kentucky,* 234 U. S. 579, 582, 34 Sup. Ct. 944, the subject was fully, ably, and logically discussed, and it clearly appears from the opinion in such case that service giving jurisdiction may be acquired upon a foreign corporation, even though such corporation through its agent at the time in question is transacting purely interstate business, and the distinction is clearly drawn between the doing of business by a corporation engaged solely in interstate commerce and that of intrastate business, as is contemplated by sec. 1770*b* of the Statutes of our state. In the *Harvester Case, supra,* the company, after having relinquished its intrastate business in the state of Kentucky, had given instructions to its agents by which they were limited to taking orders in Kentucky, which were subject to approval by the general agents without the state, and such instructions also explicitly directed that all goods of the company must be shipped from outside of the state, after the orders had been approved by the general agents in

other states or by the home office. In fact, agents were instructed that they had no authority whatever to make a contract in Kentucky. Such agents, however, were authorized to receive money or checks for debts due the company, or to take notes for the purchase price of goods, payable at any bank in Kentucky, but were expressly prevented from adjusting any disputed claims. In its decision in the *Harvester Case* the supreme court of the United States used this language:

"Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state, in our judgment, constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state. . . . True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. Such corporations are within the state, receiving the protection of its laws, and may, and often do, have large properties located within the state."

It is also contended by defendant that to subject the defendant to the service of process under the circumstances existing in the case at bar would illegally burden the transaction of interstate commerce. The state of Kansas enacted a statute which required the filing by a foreign corporation engaged in interstate commerce of a statement of its financial condition, and the obtaining of a certificate

from the secretary of state showing that such statements had been filed, as a prerequisite to the right of the corporation to maintain a suit in that state, and the United States supreme court, in *International Textbook Co. v. Pigg,* 217 U. S. 91, 30 Sup. Ct. 481, declared such statute void for the reason that it placed an illegal burden upon interstate commerce and resulted in a regulation of such commerce by the state. The court in the *Harvester Case,* in reviewing the *International Textbook Company Case,* declared that the latter case did not hold that the fact that the corporation was carrying on interstate commerce business through duly authorized agents exempted it from suit within the state of Kansas by service upon the agents. See, also, *Kendall v. Orange Judd Co.* 118 Minn. 1, 136 N. W. 291; *Duluth Log Co. v. Pulpwood Co.* 137 Minn. 312, 163 N. W. 520.

The instant case falls clearly within the facts of the *Harvester Case,* and the law as laid down in the opinion of that case is logically applicable thereto. At the time the contract in question was signed Hanson was the agent in Wisconsin of the defendant. He had been such agent for a period of four years, and continued to act in such capacity at the time the process in question was served. While acting as such agent he solicited orders for the defendant in this state, and there was a continuous course of business in the solicitation of orders in this state, in response to which defendant's product was from time to time shipped into this state. This, under the *Harvester Case,* was a course of business, not a single transaction. Besides, the agent not only accepted plaintiff's check for $566, but cashed the same in Wisconsin and transmitted the proceeds to the defendant in Illinois. He also, in the form of an addendum to the contract, made an allowance to the plaintiff, for a specific purpose, of $21.50. During the four years while acting as such agent said Hanson in his representative capacity was entitled to and did receive the protection of the laws and the courts of this state. The transactions

for the sale of defendant's manufactured product were initiated by such agent, and the false representations which are the basis of the suit in question were made by the agent in his representative capacity. Under these circumstances it would be illogical and inconsistent to hold that these things can be done in this state and at the same time hold that the company is immune from the service of process upon its agents.

The learned circuit judge based his opinion chiefly upon cases involving business transactions coming under the provisions of sec. 1770*b* of the Statutes. In accordance with what has heretofore been said, such cases have no application to the point involved in the instant case.

We therefore hold that the circuit court was in error in setting aside the service of the summons, and the order of the circuit court in that behalf is therefore reversed, with instructions that the cause be remanded for further proceedings in accordance with the opinion herein.

By the Court.—Order reversed.

STATE EX REL. PLOWMAN and another, Executors, Appellants, vs. LEAR, Town Clerk, and another, Respondents.

February 8—March 14, 1922.

Highways: Laying out highways: Award of damages by assessment or agreement: Appeal: Statutes in pari materia: Construction.

1. In a proceeding to lay out a highway under sec. 1270, Stats., an agreement between the town board and a property owner as to the damages sustained by him is an award of damages although not arrived at by assessment; and sec. 1286*a*, Stats., authorizes an appeal by a taxpayer to the county judge from an award of damages whether the amount was ascertained by assessment or agreement.

2. Statutes *in pari materia* must be construed together, and recourse must also be had to the object of the legislature and the rights obviously sought to be safeguarded.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

In laying out a highway the town board, pursuant to the provisions of sec. 1270, Stats. 1919, entered into a written agreement with the owner of the land through which the highway ran as to the amount of damages sustained by the owner. Two resident taxpayers, pursuant to sec. 1286*a*, Stats. 1919, took an appeal to the county judge from such agreement as to damages. The relators objected to the jurisdiction of the judge, but the objections were overruled and the judge proceeded to draw a jury and assess the damages. Upon review by *certiorari* from the circuit court the jurisdiction of the county judge was sustained, and from a judgment entered accordingly the relators appealed.

For the appellants there was a brief by *John C. Hart* of Waupaca, and oral argument by *B. R. Goggins* of Wisconsin Rapids.

For the respondents there was a brief by *Browne, Browne & Smith* of Waupaca, and oral argument by *L. D. Smith.*

VINJE, C. J. Does sec. 1286*a*, Stats., authorize an appeal from an agreement as to damages by a taxpayer? The relators claim that such appeal lies only from an award of damages and not from an agreement as to damages. Sec. 1286*a* reads as follows:

"Any resident and taxpayer of a town in which a highway shall be laid out, altered or discontinued, or if such highway is laid out, altered or discontinued on the town line between two towns, or extending from one town into an adjoining town, under sections 1272 and 1273 of the statutes, then any taxpayer residing in either of said towns which is required by the award of damages made upon so laying out, altering or discontinuing such highway to pay

damages therefor, may within forty days after the making of any order awarding such damages, whether made in the first instance by the town board or town boards of said town or towns, or made after an appeal or appeals in such proceedings made in sections 1276 and 1281 of the statutes, believing such damages excessive, may appeal to a justice of the peace in the same or in an adjoining town in the county, or to the county judge of the same county for a jury to assess and appraise such damages sustained by any number or all the persons to whom damages were so awarded for lands in the town where he resides. Such application shall be in writing, describing the premises and naming the persons to whom damages were awarded to be paid by such town and the amount awarded to each by the town board or town boards, and shall also specify whether he appeals from the whole of such award or if only from a portion thereof the part from which he appeals. The party shall serve upon two of the supervisors of the town where he resides or of a town to which shall have been assigned the duty of paying the damages from the award of which he appeals, at least six days before the time fixed from making such application, a notice in writing specifying therein the name of the judge or justice to whom and the time and place when and where such application will be made."

Relators argue that since originally only the owner of the land through which the highway was laid out could appeal, sec. 1285, enacted in 1869, and since later by sec. 1289, enacted in 1876, such right was also given to the town supervisors, and finally by sec. 1286*a*, enacted in 1901, the right was given to taxpayers from an award of damages, it is evident that the right to appeal has been limited, and has been gradually extended. Therefore, since the right to appeal is purely statutory, the court should not extend the language of the statute beyond its express statement, and it is claimed there can be no order awarding damages where there is only a written agreement. It is also pointed out by them that sec. 1286*a* nowhere in terms gives the right of appeal from an agreement as to damages but only from an award; that throughout the section speaks

only of an award, or of awarding damages, and nowhere mentions an agreement. This is quite true, and were we limited to an examination of only said section the conclusion sought to be established by the relators would be quite conclusive. But statutes *in pari materia* must be construed together, and recourse must also be had to the object of the legislature and the rights obviously sought to be safeguarded. So we must inquire whether or not, under the whole statutory scheme as adopted by the legislature, the term *award* or *award of damages* may include an agreement as to damages. It is plain that sec. 1270 provides two methods of determining damages: one by a written agreement, and the other where no agreement can be reached by an assessment and award of damages. But it is also equally obvious that the legislature has spoken of both as an award of damages. In one case the award is arrived at by an agreement; in the other by an assessment. Sec. 1269 provides for the filing within ten days of the order laying out the highway together with the award of damages hereinafter mentioned. Now it cannot be thought that there should be no information as to damages filed in case they were arrived at by agreement, and yet the statutes provide no other time for filing such information than the one mentioned. So, also, sec. 1291 provides that all damages lawfully awarded to any person shall be a charge against the town and provides how they may be collected. This must be held to include damages by way of agreement or else there would be no lawful way provided for collecting them. From these statutory provisions it becomes apparent that the legislature has considered an award of damages to include an agreement for damages, else the statutory scheme would be incomplete. And there is no inconsistency or ambiguity about it. Reduced to a categorical statement it results in this: The amount of damages may be determined by (1) an agreement, or (2) an assessment, both constituting an award. This does no violence to the statutory

language and preserves the statutory scheme. In both cases the judgment of the supervisors must be exercised, as much in consenting by agreement to an amount as when reaching an amount by assessment. And for this reason it also becomes apparent why the taxpayer should have his appeal from the one method as well as from the other. For the supervisors could err in judgment or be corruptly influenced as much, if not more, through an agreement as by an assessment. Our conclusion, therefore, is that the appeal is allowed by the statute and was properly taken.

By the Court.—Judgment affirmed.

TEGEN and another, Appellants, vs. CHAPIN, Respondent.

February 9—March 14, 1922.

Sales: Breach of warranty: Representation that a cow is a breeder: Failure to produce mature calf: Opinion evidence: Weight: Limits: Duty of buyer to give notice: Reasonable time.

1. A warranty that a cow is a breeder does not amount to a guaranty that the cow will at the end of the full period of gestation produce a live, properly matured calf; and in an action on breach of a warranty of this kind, the fact that the cow aborted on June 16th, ten weeks before the full time, does not relieve the plaintiff buyer from proving that when she was sold on March 16th she was incapable of producing a mature calf.
2. In an action for breach of such a warranty the opinion of one expert that at the time of the sale the cow had contagious abortion, based on a single abortion after she had opportunity to contract the disease during shipment and contact with other cattle subsequent to the sale, is insufficient to take to the jury the question whether she had contagious abortion at the time of the sale.
3. Opinion evidence should not extend to the merits of the controversy where it is not clearly within the realm of scientific knowledge.

4. Opinion evidence alone is not conclusive in any case, but the jury must pass on the probabilities; and unless the opinion relied on is within the scope of reason and common sense it should not be regarded.
5. Where the buyer lived only 130 miles from the seller and there was daily communication between the two places, a delay of fifty-seven days in notifying the seller of a breach of the warranty, after an abortion which the buyer claimed established the breach, was unreasonable under sec. 1684*t*—49, Stats., relieving the seller from liability for breach of warranty unless the buyer gives notice within a reasonable time after he knows or ought to know thereof.
6. While under said sec. 1684*t*—49, Stats., acceptance of the goods does not waive recovery for breach of warranty, it charges the buyer with the duty of giving notice, and he must, in the absence of circumstances excusing or justifying delay, move with some degree of promptness under all the circumstances.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Breach of warranty. From the complaint it appears that the plaintiffs own and operate a dairy at Kennon, Price county, Wisconsin. That on March 16, 1920, the defendant conducted a public auction sale of registered Guernsey cattle at his farm in Iola, Wisconsin, and at the time of said sale defendant represented and warranted in writing that in case any animal should prove not to be a breeder, or, if announced as bred, should prove not to be in calf, the animal could be returned to the defendant and the bid price would be promptly remitted. And that the defendant further represented and warranted in writing that every animal in the sale had been tuberculin tested and a certificate of health would be furnished to every purchaser if desired.

That relying upon said warranties the plaintiffs purchased one registered Guernsey heifer offered at said sale, known as Eymbie, No. 83305, announced as bred on November 29, 1919, for the sum of $405, the purchase price being paid in cash. That on August 10, 1920, the plaintiffs discovered that said heifer was not a breeder, promptly notified

the defendant thereof, and offered to return the said heifer, but that the defendant refused to accept said heifer or to return any part of the purchase price.

A second cause of action was stated, but the issues arising on that are not argued or urged here and it will be disregarded. The same is true of defendant's counterclaim.

The defendant by his answer admitted the holding of the sale, denied that he made any representations or warranties except such as were contained in a catalog of which the plaintiff had notice, and under which the sale was conducted and the transactions between the parties were had. As to the sale of Eymbie, No. 83305, the defendant complied in all respects with the representations and warranties contained in his catalog.

Upon the trial the court directed a verdict for the defendant, and upon the verdict a judgment was entered dismissing the plaintiffs' complaint upon the merits, and for costs taxed at the sum of $52.42, from which judgment the plaintiffs appeal.

For the appellants the cause was submitted on the briefs of *J. V. Ledvina,* attorney, and *W. K. Parkinson,* of counsel, both of Phillips.

For the respondent there was a brief by *H. J. Severson* of Iola, attorney, and *B. R. Goggins* of Wisconsin Rapids, of counsel, and oral argument by *Mr. Goggins.*

ROSENBERRY, J. The plaintiffs contend that there was evidence upon which the case should have been submitted to the jury and that therefore the direction of a verdict by the court was error. It is argued that the defendant warranted the animal to be a breeder; that the plaintiffs purchased the animal in question in reliance upon the warranty; that she was bred on November 29, 1919, and in the ordinary course of events should have produced a mature calf on August 29, 1920; that on June 16, 1920, ten weeks prior to the full time, she aborted, giving birth to an immature calf

born dead. And it is argued that the bare fact that the cow did not produce a mature calf was in itself sufficient evidence to carry the case to the jury on the proposition of whether or not there was a breach of the warranty. In our opinion a warranty that a cow is a breeder does not amount to a guaranty that the cow will at the end of the full period of gestation, every time she is with calf, produce a live, properly matured calf. It may be said to be a matter of common knowledge that abortions occur occasionally, if not frequently, as a result of injury, straining, or from other natural causes having nothing to do with the animal's capacity to produce a matured calf in the usual course of time under ordinary normal conditions. We are therefore of the opinion that the burden was upon the plaintiffs to establish by a fair preponderance of the evidence that the cow was at the date of the sale, on March 16, 1920, incapable of producing a mature calf. Upon this branch of the case the only evidence offered by the plaintiffs was that tending to show that the cow had a disease known as contagious abortion. Upon that issue it appeared without dispute that the defendant had never had contagious abortion upon his farm where the cow in question was born and reared, and there was no evidence tending to show that the cow was at the time of sale infected, excepting that of one expert who testified in response to a hypothetical question that in his opinion the cow was infected with contagious abortion on March 16th. This same witness, however, testified that cows may have abortions without its being contagious; that such might have been the fact in this case; that his opinion was based upon the fact that another cow from this herd had aborted, it appearing, however, that the herd into which she was sold was an infected herd and had been for some time. It further appeared from his cross-examination that he based his opinion partly upon the fact that two heifers which had been bred were returned for the reason that they were not with calf, admitting, however, that

healthy females do not always beget one hundred per cent.; that they are doing well when they average a sixty to sixty-five per cent.; that "a good many things cause abortion—a mere straining, jumping, or being hooked, or something of that kind without leaving a mark, might cause abortion." This witness further testified that he had been on defendant's farm; that he had never found contagious abortion in any of his herds at any time; that contagion might be in a car in which the animal was shipped; most of contagion is had by shipping in cars. Feeding out of the same mangers, putting cattle in the same barns, or running with other stock, will spread the contagion. It is considered that the opinion of this witness is not sufficient to raise an issue of fact for the jury. It is clear from the testimony of this witness that the abortion may have been produced by accident, may have been contracted in the course of shipment, may have been contracted by the animal running with other stock. The answer was a mere guess or conjecture. The only fact upon which the expert could base his opinion that this cow was infected on March 16th with contagious abortion was the mere fact that the calf was born dead prematurely. The opinion based upon that fact, under the evidence in this case, is not within the field of scientific knowledge and therefore not a proper subject of expert testimony. The jury was just as able to determine whether or not the animal was infected as was the witness, and opinion evidence should not extend to the merits of the controversy where it is not clearly within the realm of scientific knowledge. *Sullivan v. M., St. P. & S. S. M. R. Co.* 167 Wis. 518, 525, 167 N. W. 311; *Benson v. Superior Mfg. Co.* 147 Wis. 20, 132 N. W. 633; *Lyon v. Grand Rapids,* 121 Wis. 609, 99 N. W. 311.

The proof in this case was not sufficiently certain and definite to establish the fact that the cow was infected with contagious abortion on the date of the sale, and under the evidence it remained a matter of doubt, speculation, and conjecture.

"Opinion evidence alone is not conclusive in any case. The jury must pass upon the probabilities, and unless the opinion relied on is within the scope of reason and common sense it should not be regarded at all. If that were not so, injustice would often rule in the jury room, because . . . there is no theory so preposterous but that men can be procured to support it under oath from the witness stand by expert evidence. On questions involving skill and experience in such matters, experts must be called from the necessities of the case, for want of better evidence; and when stripped of all the elements of mere conjecture, and pretense, and partisan influence, it is valuable, and what is left will rarely appear improbable to ordinary comprehension. It is the duty of courts and juries to do that,—to subject expert opinions to all reasonable tests to determine their credibility." *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 330, 80 N. W. 644; *Bourda v. Jones,* 110 Wis. 52, 85 N. W. 671.

It appears without dispute that the abortion occurred on June 16th and that the plaintiffs gave no notice thereof to the defendant until August 12th.

"Sec. 1684*t*—49, Stats. . . . But, if, after acceptance of the goods, the buyer fails to give notice to the seller of any breach of the promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

Such was the law prior to the adoption of the Uniform Sales Act. *Northern E. M. Co. v. H. M. Benjamin C. Co.* 116 Wis. 130, 92 N. W. 553.

While ordinarily the question of what constitutes a reasonable time is a question of fact for the jury, in this case, where there was a delay of fifty-seven days, there being no circumstances excusing or justifying the delay, it is held that notice was not given within a reasonable time as a matter of law, and the seller was therefore not liable for a breach of warranty had there been one. Plaintiffs lived in Price county, 130 miles from Iola, the place of sale. There was regular daily communication between the places. The

plaintiff *H. W. Tegen* had notice of all the facts of which he ever had notice that the cow was not a breeder when the cow aborted on the 16th day of June. His excuse for failing to give notice is that during the interim he was endeavoring to discover whether or not the cow had contagious abortion, but upon the claim now made by him—and that is that the fact that the cow aborted established a breach of warranty—the question of whether or not the abortion was contagious was immaterial. Upon the other aspects of the case there is no proof here, excepting the mere fact that she aborted, that the cow was infected at the time of the sale. We think in this case a delay of nearly two months was not justified. In transactions of this character, relating to the sale or exchange of personal property, while under the Uniform Sales Act the acceptance of the goods does not waive the right of recovery for breach of warranty, it charges the purchaser with the duty of giving notice, and that within a reasonable time. If the object of the statute is to be accomplished—that is, the parties enabled to make such investigations or take such steps as may be necessary to protect their rights,—it must be held, in the absence of circumstances excusing or justifying delay, that the buyer must move with some degree of promptness under all the circumstances. This is the rule adopted in applying sec. 1684*t*—48, Stats., and there is no reason why it should not obtain in applying sec. 1684*t*—49, the time specified in each section being a reasonable time. *J. L. Owens Co. v. Whitcomb*, 165 Wis. 92, 160 N. W. 161; *J. B. Bradford P. Co. v. Baal*, 166 Wis. 134, 164 N. W. 822.

By the Court.—Judgment affirmed.

PIONKE, Appellant, vs. WASHBURN, Respondent.

February 9—March 14, 1922.

Boundaries: Agreement to have survey made: Effect: Assessment of damages by court and not by jury: Harmless error.

1. A mere agreement to have a survey of lands made, without a further binding agreement to abide by any resulting change in the established and recognized lines, is insufficient to change the lines; and the fact that the defendant changed one line by reason of a survey so made to include additional land to the north did not change another line to the west.
2. One cannot complain that the court erred in assessing damages against him for trespass on the ground that the question was for the jury, where the damages allowed were the minimum amount disclosed by the evidence.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The complaint alleged two separate causes of action, each based upon defendant's alleged trespasses on lands claimed to be owned by plaintiff, the first relating to a narrow strip of about one acre on the westerly edge, and the second to a small triangular piece of about one half an acre at the southern extremity of the land claimed to be owned by defendant.

Defendant alleged title by deed to the land involved and also alleged exclusive and continuous possession thereof for more than twenty years under claim of ownership and relied upon several statutes of limitation in that behalf. Defendant also counterclaimed praying to have his title quieted to such real estate as against any claim by plaintiff, and by amendment at the trial alleged a trespass by plaintiff on defendant's lands and prayed for $100 damages for such trespass.

At the close of the trial the court directed the jury to find a verdict for the defendant, and, after denying plaintiff's motion for a new trial, directed the entry of judgment dismissing plaintiff's complaint upon the merits and granting

defendant relief upon his counterclaim quieting his title to the lands as described in said judgment and with $10.50 damages on account of plaintiff's trespass thereon. From such judgment the plaintiff has appealed.

A. L. Smongeski of Stevens Point, for the appellant.

For the respondent there was a brief by *Goggins, Brazeau & Goggins* of Wisconsin Rapids, and oral argument by *B. R. Goggins.*

ESCHWEILER, J. The defendant had been in possession for more than twenty years prior to the commencement of the action of a right-angled triangular piece of land of about nine and one-half acres, with its base to the north and with the longer side to the east, where it was separated by a highway from lands owned by plaintiff. The plaintiff also owned the land adjoining defendant to the north and west. All the lands were in section 31, town 21 north, range 9 east.

Prior to 1902 some doubt appeared to have existed as to the true location of the lines in this particular section 31. A petition appears to have been signed by defendant and other landowners in that vicinity to have such lines established, and pursuant thereto in 1902 a surveyor named Halliday located the government corners in that section and ran the lines across the same, subdivided the section, and fixed the exact boundaries of the respective lots into which that section had been subdivided, and placed his survey on record.

The survey, so far as the parties here are concerned, located the boundary lines between them more to the north and to the east than the former fence lines.

In 1904 the plaintiff and defendant recognized such new division line so moved to the north by each building a fence on his land about four and one-half feet from such new line.

The plaintiff asserts in this action that the defendant,

having so taken such additional strip of land on his north line, is legally or at least equitably bound to concede to plaintiff the strip of land on the westerly side of defendant's premises which would be included by the newly established line along that boundary.

As to such westerly strip, however, the defendant has, under the facts shown herein, established his absolute title. There is no showing made of any agreement between the parties or between defendant and any of the others who joined in the petition for the survey of 1902—the petition itself, however, not being offered in evidence—that defendant would be bound by the result of such survey as affecting his then title to any of the lands involved. The mere agreement by parties to have a survey made without a further binding agreement that they will abide by any resulting change in the then established and recognized lines would be insufficient to support plaintiff's present claim. *Anderson v. Huebel,* 133 Wis. 542, 545, 113 N. W. 975; *Duel v. Bluembke,* 154 Wis. 519, 143 N. W. 179; *Peters v. Reichenbach,* 114 Wis. 209, 215, 90 N. W. 184.

Defendant's legal title, therefore, to such strip along his westerly boundary line and up to the fence so long maintained there remains unimpaired, and the trial court was right in so disposing of the case.

The same result must be reached as to the one-half acre piece at the southerly tip of defendant's land.

The plaintiff further assigns as error the assessing by the court of $10.50 damages for plaintiff's trespass on defendant's lands on the ground that, the amount of damages being in dispute, it was a subject for jury assessment. The damages allowed being the minimum amount disclosed by the evidence, we cannot say that there was prejudicial error in this regard.

By the Court.—Judgment affirmed.

WEINZIRL and others, Appellants, vs. WEINZIRL, Respondent.

February 9—March 14, 1922.

Specific performance: Evidence sufficient to establish contract: Joinder of actions: Specific performance by heir and conversion by administrator.

1. Statements and admissions of the defendant indicating a willingness to convey a tract of land to his son (since deceased), unaccompanied by proof that the son went into possession of the land under any contract or that he ever assented to any terms suggested by the father, are *held* insufficient to establish a binding contract between them.
2. Sec. 2602, Stats., providing that all persons having an interest in the subject and in obtaining the relief demanded may be joined as plaintiffs, and sec. 2647, providing that several causes of action may be brought in the same complaint if so united that they affect all parties and do not require different places of trial and are stated separately, do not authorize the uniting of an action by an heir for specific performance and a claim by an administrator for conversion for the recovery of damages.

APPEAL from a judgment of the circuit court for Dunn county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Specific performance. This action is brought by *Mary Catherine Weinzirl,* widow of William Henry Weinzirl, *H. W. Rudow,* as guardian *ad litem* of *William Wayne Weinzirl,* posthumous son of William Henry Weinzirl and *Mary Catherine Weinzirl,* and *Mike Sand,* administrator of the estate of William Henry Weinzirl, deceased, to compel specific performance of an oral contract alleged to have been made by the defendant with William Henry Weinzirl, deceased, in the fall of 1918, by the terms of which it is claimed that *Henry Weinzirl* agreed to sell and convey to the deceased eighty acres of land situated in Dunn county. and to recover the value of certain personal property belonging to the deceased. William Henry Weinzirl died on

the 4th day of March, 1919, and *William Wayne Weinzirl* was born in November, 1919. Upon the trial the court found the facts already stated, and in regard to the appointment of the administrator and the probate of the estate of William Henry Weinzirl, deceased, and upon the merits, found as follows:

"That at all times mentioned in the complaint the defendant was the owner in fee simple of the following described real estate [setting out the description], but that the allegations of the complaint charging that the defendant, before the death of William Henry Weinzirl, promised and agreed to convey said premises to William Henry Weinzirl, and the allegations of said complaint charging that said William Henry Weinzirl, in reliance upon such promise and agreement, entered into possession of said real estate and made substantial improvements thereon, and the allegations of said complaint charging that the defendant, in the performance of said promise, surrendered possession of said premises, and that in such performance of said promise he entered in his book of account [defendant's ledger, page 178] the memorandum referred to in the complaint and received in evidence herein, are not proven or established by the evidence in this case.

"That said William Henry Weinzirl, together with his two brothers John and George Weinzirl, occupied said premises, before and at the time of his death, as the tenant of the defendant *Henry Weinzirl,* and that he at no time held possession of any part of said premises except as such tenant. That said memorandum was entered by the defendant in his book of account not in performance of the alleged promise to convey said premises to said William Henry Weinzirl, but was entered therein by him as an intended testamentary disposition on his part."

The court made certain findings in regard to the personal property which are not material. The court concluded that as a matter of law the plaintiffs were not entitled to specific performance and judgment was entered dismissing the complaint, without prejudice to the right of the administrator

to bring an action in respect to the personal property. From judgment entered accordingly the plaintiffs appeal.

For the appellants there was a brief by *E. S. Pattison* of Durand and *White & White* of River Falls, and oral argument by *Mr. F. M. White* and *Mr. Pattison.*

For the respondent there was a brief by *Gilman & Broadfoot* of Mondovi, and oral argument by *S. G. Gilman.*

ROSENBERRY, J. It appears from the evidence that the defendant is a farmer fifty-nine years of age, living in the town of Eau Galle, Dunn county, and owns 280 acres of land on which he lived, a part of which is the eighty acres in controversy here. His family consisted of his wife, four sons, and three daughters, including the deceased, William Henry Weinzirl. The deceased William Henry had worked at home from childhood.

On August 20, 1915, the defendant leased the eighty acres in dispute to one William Rodewald for three years, who remained in possession until he removed the crop in the fall of 1918. Of the eighty-acre tract twenty-five acres were under cultivation in 1918, thirty-five acres in pasture, and there were twenty acres of cut land containing saw timber, basswood, maple, elm, and a few oak. There was not and never had been a house upon the land or building of any kind.

In 1916 the defendant rented all of his land, except that leased to Rodewald, to his sons, George, William, and John, and thereafter they operated the farm, the father furnishing the necessary stock, machinery, and equipment. This arrangement continued up to the death of William Henry on March 24, 1919.

In 1917 William Henry registered and was first given deferred classification and afterwards placed in Class 1. The defendant then became very active in his attempts to secure a reclassification, visited members of the draft board in Dunn and Pepin counties, in which interviews he made representations to the effect that William owned the eighty

acres in question, that he was desirous of giving him a deed to it, and stated to other parties that the eighty acres in question belonged to William. William was inducted into service and was discharged and returned home in August, 1918.

After the expiration of the Rodewald lease William bought dynamite to the amount of $120.50, which was used in blasting stumps upon the land in dispute. In January, 1919, William cut and hauled from the eighty acres in question 12,000 feet of saw logs, for which the defendant makes no claim. In February, 1919, he was married to the plaintiff *Mary Catherine,* who was teaching school in the neighborhood. After their marriage William Henry and his wife lived with the defendant. *Mary Catherine* testified that the defendant told her that he had agreed to let William have the farm for $5,000, that he had allowed Will $2,500 for his work, and that was to be deducted from the $5,000. *Mike Sand,* father of the wife of William, testified that the defendant told him that he had bargained to sell Will the eighty for $5,000 and had given him $2,500 for his labor off from the purchase price.

On February 3, 1919, the defendant made an entry in his account book with William Henry Weinzirl as follows:

Farm	$5,000 00
Car bought	461 95
Shock absorbers	384 65
Money loaned	31 50
Six cows	350 00
One coming 2 year old	35 00
Living expense	91 00
Seven hogs	181 32
Cash	500 00
One set of harness	20 00
One horse June	150 00
	$7,205 42
Inheritance	2,500 00
	$4,705 42

The defendant testified that if he had Will charged up with six cows in February, 1919, he owned them, and that if he had him charged with seven cows he owned them and they were on the place. Upon the death of William Henry the defendant took possession of all the personal property.

After *Sand* was appointed administrator he made a demand upon the defendant for a performance of the alleged contract and the possession of the personal property, and the defendant refused to convey and denied that there was a contract. We shall not state the facts relating to the personal property, as we deem it not material upon the issue presented here.

The question presented here is, Are the findings of the court against the great weight and clear preponderance of the evidence? For if the facts are as found by the trial court, no right to specific performance on behalf of the plaintiffs, or any of them, exists. We have set out the main facts relied upon by the plaintiffs in this action to sustain their contention. If it be conceded for sake of argument that the trial court was in error (we do not so find) in holding that such possession as William Henry Weinzirl had was under and by virtue of the lease made between William Henry and his brothers with the father, *Henry Weinzirl,* nevertheless the record is barren of any evidence which shows that the minds of the parties ever met upon the terms of a contract. He may have gone into possession under the terms of the lease, himself and brothers with the father simply taking over the property when the Rodewald lease expired. There is nothing to show that he went into possession under the alleged contract. There is no evidence in the record which shows, or tends to show, the assent of William Henry to the claimed contract. The statements and admissions of the defendant indicate a willingness on the part of the defendant, especially during the period of the draft, to convey these premises to his son, William Henry. He never did convey them, nor is there any evidence of any

negotiations leading up to or amounting to a contract between father and son. That the father was predisposed to make some such disposition of his property as is indicated by the statement in his account book seems to be established, but we find no evidence of record that he ever contracted to do so. There may have been some tacit understanding between them, but there is nothing that raises that understanding to the dignity of a contract.

It is urged here that the court erred in dismissing the complaint as to the personal property. That there was a clear misjoinder of actions in this case seems apparent. There was an action on behalf of the widow and the heir to compel specific performance. A part of the cause of action was the right of the administrator to recover the value of the personal property of the deceased. Under sec. 2602, Stats., all persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, but it is required by sec. 2647 that, while the plaintiff may bring in the same complaint several causes of action, "the causes of action so united must affect all the parties to the action and not require different places of trial, and must be stated separately." This does not authorize the joining of two separate independent causes of action between different parties, one of which is an action in equity to compel specific performance of a contract, and the other an action for conversion for the recovery of damages. *Midland T. C. Co. v. Illinois S. Co.* 163 Wis. 190, 157 N. W. 785; *Tyre v. Krug,* 159 Wis. 39, 149 N. W. 718.

By the Court.—Judgment affirmed.

HERMANSEN, Respondent, vs. SLATTER and wife, Appellants.

February 9—March 14, 1922.

Specific performance: Contract to convey land: Time as essence: Intention of parties: Conduct: Waiver of nonperformance: Estoppel: Findings of court.

1. Where time is not of the essence of a contract and the thing to be done can be as well done at a later as at an earlier day without detriment to the party for whom it is to be done, the delay will not prevent specific performance.
2. In equity the modern tendency is not to hold time as of the essence of a contract; but if the contract, with the surrounding facts and circumstances, shows that the parties intended time to be of the essence, full effect will be given to the intention, although there is no clause in the contract declaring it so.
3. If either party unreasonably delays in complying with the terms of the agreement the other may assign a reasonable time within which performance shall be made. The time thus allotted becomes essential, and if performance is not made before it elapses equity will not aid the defaulting party in enforcing the contract.
4. The evidence (stated in the opinion) as to the surrounding circumstances and conduct of the parties is *held* to present a question for the trial court as to whether it was the intention of the parties that a contract for a conveyance of land on a fixed date made time as of the essence.
5. Though the title of a vendor of land was defective, if he had acted with reasonable promptness to perfect it, or if delay in perfecting it was waived, specific performance might be compelled even though title was not perfected until the time of the trial.
6. In an action for specific performance, the evidence is *held* not to justify disturbing findings of the trial court that the vendee did not waive the delay of the vendor in perfecting title, or estop himself to object.

APPEAL from a judgment of the circuit court for Pierce county: GEORGE THOMPSON, Circuit Judge. *Affirmed.*

Action to recover $1,000, earnest money paid by plaintiff to defendant upon the making of a contract for the sale of a certain farm to plaintiff.

The complaint set out the contract, the material parts of which are as follows:

"That the said party of the second part [plaintiff] agrees and binds himself . . . to pay to the party of the first part the sum of $12,000 in manner as follows, to wit: $1,000 down, the receipt whereof is hereby confessed and acknowledged, and $11,000 to be paid on November 1, 1920, the above payments being intended to apply when fully completed on the purchase price of the following described premises: . . .

"Conveyance to be made by said parties of the first part by good and sufficient warranty deed upon payment to them of said $11,000 as aforesaid on November 1, 1920, and possession to be given upon payment of said sum; said parties of the first part agree to furnish an abstract of title showing a good and marketable title in them, free and clear from all defects. . . .

"It being further understood . . . that said $1,000 paid is earnest money, and in case of the failure of said party of the second part to comply with the terms and conditions of this contract said sum shall be forfeited to first parties as liquidated damages, but said forfeiture shall in no way affect the rights of either party hereto for specific performance of this contract."

The breach alleged was that on November 1, 1920, defendant did not tender an abstract showing a clear and marketable title, but in fact offered one which showed several unsatisfied mortgages incumbering the property. The relief demanded was a return of the earnest money and cancellation of the contract.

The answer alleged that on November 1, 1920, defendant tendered a good and sufficient warranty deed and notified plaintiff that an action to quiet title had been begun to cure the defects set out in the complaint and that judgment for defendant would follow as a matter of course; that said judgment was in fact obtained on December 21, 1920; that on December 23d the abstract was continued to show a good and marketable title; that defendant has ever since

been ready, able, and willing to deliver the abstract; and that plaintiff has refused to receive the same.

As a second defense defendant alleged that plaintiff secured the abstract about September 1, 1920; that on October 15th he notified defendant of certain defects and demanded that an action to quiet title be brought; that under the Wisconsin practice, final judgment in such an action cannot be rendered until sixty-two days after the commencement of the action; that defendant brought the action and secured final judgment on December 24, 1920, sixty-seven days after he had received the notification from plaintiff; that defendant brings the deed and abstract to court and tenders them to plaintiff.

By way of counterclaim defendant alleged the above facts and prayed for a decree of specific performance of the contract.

The contract was made March 31, 1920. At that time the abstract was in the possession of the Federal Farm Loan Bank. On the next day it was returned to defendant, who took it to the Farmers and Merchants Bank, River Falls, where it remained until the first of the following September. It is undisputed that the Federal Bank would not accept the title shown by the abstract as collateral for a loan until some corrections should be made.

Plaintiff testified that defendant agreed to send him the abstract; that on July 11th he asked for the abstract and failed to get it; that on July 22d he again asked defendant for the abstract and called at the Farmers Bank to get it and was told he could not have it because the head of the bank was not there; that on the above dates he told defendant that they had sold his farm and would surrender possession November 1st, and would have to have possession of the farm in question on that date.

Defendant introduced testimony tending to show that plaintiff could have secured the abstract from the bank at any time, particularly on July 22d, when he looked at it, but,

according to the testimony of the cashier, did not ask for it. Judgment was rendered dismissing the counterclaim, canceling the contract, and awarding plaintiff $1,000, with interest from March 31, 1920, and the costs of the action.

For the appellants there was a brief by *Knowles & Doolittle* of River Falls, and oral argument by *Mr. L. S. Doolittle.*

For the respondent there was a brief by *Howard D. Blanding* of St. Croix Falls and *John E. Foley* of Ellsworth, and oral argument by *Mr. Blanding.*

JONES, J. The trial court found as facts, in addition to the making of the contract and the payment of $1,000, that it was the intention of the parties that the time fixed for performance should be a material and essential part of the contract; that on November 1st defendants failed to execute their part of the contract; that defendants did not procure a sufficient abstract until December 23, 1920, and did not tender it until March 10, 1921, when the cause came up for trial; that the plaintiff fully performed his part of the contract; that the time for performance had not been extended; and that plaintiff was not estopped to claim the benefits of the provisions of the contract.

In finding that time was of the essence of the contract the trial court did not base the decision on the written contract alone.

The contract contains no specific provision making time of the essence.

Where time is not of the essence of the contract and the thing to be done can be as well done at a later as an earlier day without detriment to the party for whom the thing is to be done, the delay will not prevent specific performance. It is the modern tendency, especially in equity, not to treat time as of the essence unless there is some express term in the contract so providing. 13 Corp. Jur. 686; 4 Page, Contracts (2d ed.) §§ 2105, 2106.

But, "although there is no express provision in a contract which makes time of the essence, the contract taken as a whole and construed in connection with the surrounding facts and circumstances may show that the parties intended that time should be of the essence of the contract, and if such intention appears, full effect will be given to it." 4 Page, Contracts (2d ed.) § 2108.

It was agreed that the conveyance was to be made and an abstract showing merchantable title was to be furnished on a given day, and there was a condition that a loan might be procured on the premises payable on the same day. There was testimony that the vendee had sold his own farm and that he notified the vendor on July 11th and July 22d of this fact; that he then gave notice that, as he had sold his farm and must give possession on November 1st, he must then get possession of the premises involved in the contract.

All these facts were doubtless considered by the trial court in coming to the conclusion that it was the intention of the parties that the question of time was not merely formal but was essential.

In order to prevent injustice it has frequently been declared to be the rule that:

"If either the vendor or the vendee has improperly and unreasonably delayed in complying with the terms of the agreement on his side, the other party may, by notice, fix upon and assign a reasonable time for completing the contract, and may call upon the defaulting party to do the acts to be done by him, or any particular act within this period. The time thus allotted then becomes essential, and if the party in default fails to perform before it has elapsed, the court will not aid him in enforcing the contract, but will leave him to his legal remedy." Pomeroy, Spec. Perf. (2d ed.) p. 482, sec. 395, citing many cases.

In view of the undisputed fact that the vendor had his abstract April 1st and that it showed the title to be defective; that he had made no move to have it corrected until October 15th, there is much force in the claim of counsel for vendee

that the notices given on July 11th and 22d sufficed to make time an essential element of the contract. It is clear that the acts of parties subsequent to the execution of the contract may have an important bearing in determining the question whether time was intended to be essential. *James v. Knox,* 155 Wis. 118, 143 N. W. 1071. It is true that there is conflict in the testimony as to whether these notices were given and as to the time when the vendee could have obtained the abstract for examination, but these were matters for the determination of the trial court.

It is argued by counsel for the vendor that, even if time was of the essence of the contract, the vendee by his conduct waived the provision and estopped himself to claim the benefit of it. This claim is based on evidence that the vendee obtained the abstract for examination by his attorney and gave no notice of any objection to the title until six weeks later, October 15th, and that on that day, at the office of the vendor's attorney, it was discussed that it would require five or six weeks to perfect the title and that the vendee made no objection, and that relying on this the action to quiet title was commenced and carried through.

The counsel for the vendor are correct in their contention that parties may waive the strict performance of contracts of this character and may be estopped by their conduct. There is undoubtedly force in their claim that the abstract was retained for an unreasonable time for examination by the vendee and his counsel, but the parties and their counsel lived in towns a considerable distance apart and the vendor had undoubtedly shown great negligence by his delay in furnishing the abstract and by failing for so long a time to take any steps to comply with the plain terms of his contract. If he had acted with reasonable promptness, or if the court had found that his delay had been waived, the court would have been justified in compelling specific performance even though the title was not perfected until the time of the trial. For this there is abundant authority.

Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; Pomeroy, Spec. Perf. (2d ed.) sec. 376, and cases cited.

The argument that the vendor was subjected to expense in perfecting his title has little weight, since such a proceeding would have been necessary at some time to give him a marketable title. But the questions of waiver and estoppel in this case were questions of fact for the trial court. The trial judge heard and saw the witnesses and their demeanor, and we do not feel justified in disturbing his findings holding that there was no waiver or estoppel.

By the Court.—Judgment affirmed.

PAYNE and others, Respondents, vs. MEISSER, Executor, and another, Appellants.

February 9—March 14, 1922.

Waste: Survival of action: Jurisdiction of circuit court: Necessity of present seizin by plaintiff: Claims arising in tort: Jurisdiction of county court: Parties to action.

1. Under sec. 4253, Stats., providing that actions for damages to real or personal estate shall survive the death of the wrongdoer, an action for waste, in so far as actual as distinguished from double damages is sought, survives against the estate of a deceased life tenant.
2. To maintain an action for waste it is not necessary that one who had a reversionary interest in the land should be seized of such interest at the time the action was brought, it being sufficient if he was seized thereof when the waste was committed.
3. Sec. 3252, Stats., authorizing the bringing of actions for wrongs done to property, rights, or interests against the executors or administrators of the wrongdoer, and sec. 3170, giving the circuit court jurisdiction of actions for waste, confer jurisdiction on the circuit court in such an action whether or not the plaintiff has filed a claim against the estate in the county court in accordance with secs. 3838, 3840, 3843, and 3844.

4. Waste, either permissive or commissive, is an action sounding in tort, and purely tort actions against a deceased person should be prosecuted against his personal representatives in the circuit court or in such other court of civil jurisdiction as the legislature might designate. [It is not held in this case that where a tort may be waived a claim cannot be filed in the county court on implied contract.]
5. Under sec. 2604, Stats., a reversioner who refuses to join as a party plaintiff in an action against the executor of the life tenant for waste committed by deceased is a proper party defendant.

APPEAL from an order of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The complaint in substance alleges that one Charles Payne was the owner of certain lands situated in section 10, township 10 north, range 6 east, in Sauk county, Wisconsin, and that under and pursuant to the provisions of his last will and testament, which upon his death was duly admitted to probate, he devised a life estate in said real estate to one William H. Payne upon condition that he keep the buildings and fences thereon in good repair, build new fences when necessary, pay all taxes of every kind and nature that might thereafter be assessed against said premises, and also pay to the widow of the said Charles Payne an annuity of $250, and after said life estate the said lands were devised in fee in equal shares to the daughter of the said William H. Payne, to wit, *Martha M. Payne* (now the defendant *Martha Meisser*), and to the sons of said Charles Payne, to wit, *Jefferson C. Payne*, Isaac N. Payne, and to his daughter, Elizabeth M. McGilvra, the child or children of any deceased child to take his or her share of said farm *per stirpes* and not *per capita;* that in and by the final decree in the matter of the estate of said Charles Payne, deceased, the county court of Sauk county thereafter assigned and transferred said real estate in accordance with the provisions of said last will and testament; that thereupon, and during the life of the said William H. Payne, the said Elizabeth M. McGilvra died, leaving her surviving the following children,

who are among the plaintiffs herein, namely: *Ernest, Nellie, Perry, Lee, Guy, Lawrence, Earl,* and *Russell McGilvra;* that in the year 1908 said Isaac N. Payne sold and transferred all his right, title, and interest in and to said premises to the plaintiff *J. C. Payne;* that said William H. Payne, in October, 1908, entered into possession of said premises and remained in possession thereof until on or about March 1, 1919, when the same were sold to one Louis Young; that after the sale of said premises to Young as aforesaid the said William H. Payne died testate, and that the defendant *John Meisser* was thereupon duly appointed administrator with the will annexed of the estate of the said William H. Payne; that at the time said William H. Payne, life tenant, took possession of said premises the same were in good repair and condition, and that while in such possession he was guilty of various acts of permissive and commissive waste, to the great damage of the reversioners under the will of said Charles Payne, deceased; and that said real estate when sold realized a sum of money amounting to $7,000 less than what the same would have been worth had such acts of waste not been committed; that the defendant *Martha Meisser* refused to join as a party plaintiff in this action, and was therefore made a party defendant; that the actual damages sustained by the plaintiffs by reason of such alleged acts of waste amount to $5,000. The complaint, therefore, under and pursuant to the provisions of the statutes, asks for a recovery of damages from the estate of said William H. Payne, deceased, for the sum of $10,000.

The defendants demurred to the complaint upon the grounds (1) that the same does not state facts sufficient to constitute a cause of action, and (2) because the court has no jurisdiction of the person of the defendants or the subject of the action.

The lower court overruled the demurrer, from which order this appeal was taken.

For the appellants there was a brief by *Ruggles & Evenson* of Baraboo and *Sanborn, Blake & Aberg* of Madison, and oral argument by *John B. Sanborn.*

Frank R. Bentley of Baraboo, for the respondents.

DOERFLER, J. Under the first ground of the demurrer it is claimed by the defendants' counsel that the liability for waste committed does not survive against the estate of the deceased life tenant and therefore cannot be maintained against his personal representatives.

The provisions of sec. 4253 of the Statutes are decisive in determining the proposition adversely to such contention. Sec. 4253, among other things, provides:

"In addition to the actions which survive at common law the following shall also survive: . . . Actions for all damages done to the property rights or interests of another, . . . for damages done to real or personal estate."

It needs no comment to demonstrate that an action for waste involves damages done to real estate, and under the language of the statute as quoted it appears that such action survives, as clearly so as if the statute had in express terms included the action of waste in its provisions.

The action of waste, in so far as it involves damages to real estate, is like the action in trespass, with respect to which it was said in *Cotter v. Plumer,* 72 Wis. 476, 478, 40 N. W. 379:

"At the common law this action would have abated and the cause of action would have been destroyed by the death . . . of the alleged wrongdoer. *McArthur v. Green Bay & M. C. Co.* 34 Wis. 139; *Noonan v. Orton,* 34 Wis. 259. By statute (sec. 4253, R. S.) a cause of action for damages done to real or personal estate survives the death of the trespasser or wrongdoer, and may be prosecuted to judgment against his executor or the administrator of his estate. This is such an action. But sec. 4254 limits the recovery to 'the damages actually sustained, without any vindictive or exemplary damages. . . .' But for sec. 4253 the death

of B. G. Plumer would have terminated the action and the right of action as well. Sec. 4254 saves both the action and the right to the extent of actual or compensatory damages. . . ."

We therefore hold that the action for waste, for actual—meaning single, not double—damages, in the instant case, survives and is maintainable against the personal representatives of the deceased, William H. Payne.

Under the first ground of the demurrer it is also contended by defendants' counsel that, inasmuch as the plaintiffs had disposed of their interest in the property prior to the commencement of this action, they cannot now bring an action for waste, and that the action of waste depends upon privity of estate between the parties, so that if the reversioner grants away his reversion after waste done no action in this form will lie.

In *Robinson v. Wheeler*, 25 N. Y. 252, 259, it was held:

"It is no longer necessary, to enable one who has had a reversionary interest in lands, to maintain an action in the nature of waste, that he should be seized of the interest at the time the action is brought. It is enough if he was seized of the interest at the time the waste was committed."

The statutes of New York, under which the foregoing decision was rendered, are almost identical with those of Wisconsin on the subject of waste, and it would appear that our statute was originally taken from New York. Since the decision in the *Robinson Case* the legislature of New York has amended the statute, making the decision a part of the statutory law of that state.

"No person can maintain the action unless he has an estate of inheritance in him at the time when the waste is committed, although such interest need not continue to exist in plaintiff at the time of the commencement of the action." 40 Cyc. 528, 529; *Dickinson v. Baltimore*, 48 Md. 583, 30 Am. Rep. 492; *Purton v. Watson*, 2 N. Y. Supp. 661.

The demurrer, therefore, cannot be sustained upon this ground.

In defendants' second ground of demurrer it is claimed that the court has no jurisdiction over the person of the defendants or of the subject of the action. This branch of the demurrer involves the question whether the plaintiffs should be required, in accordance with the provisions of ch. 165 of the Statutes, to file a claim for their damages in the county court in the matter of the estate of said William H. Payne, deceased.

The title of ch. 165 of the Statutes is "Proof and payment of debts and legacies." Sec. 3838 makes it the duty of the county court, on the filing of a petition for probate of a will or for administration, to receive, examine, and adjust claims and demands of all persons against the deceased.

Sec. 3840 provides for the fixing of time by an order of the county court within which creditors shall present their claims for examination and allowance.

Sec. 3843 provides that the court shall have power to try and decide upon all claims which by law survive against or in favor of executors and administrators, except claims for the possession of or title to real estate, etc.

Sec. 3844 is entitled "Statute of limitations," and provides that claims not presented when due notice shall have been given shall be forever barred.

Sec. 3845, entitled "Actions against executors, etc.," provides:

"No action shall be commenced against an executor or administrator, excepting actions for the recovery of specific real or personal property, or actions to establish, enforce, or foreclose a lien or right of lien, on real or personal property, or to quiet title or remove a cloud on title, to construe wills, enforce the liability of stockholders, to avoid fraudulent conveyances, to affect or pass the title to real property and other actions in which the county court cannot afford a remedy as adequate, complete, prompt or efficient as the circuit court. . . . Nothing in this section shall prevent any person having a lawful claim against a deceased person from bringing an action therefor against the executor, administrator, heir, devisee, or legatee of such deceased person, when

no time has been fixed in which creditors may present their claims against the deceased for allowance, or when no notice of such limitations has been ordered or given."

In construing sec. 3838 this court in *Lannon v. Hackett,* 49 Wis. 261, 270, 5 N. W. 474, held that the county court has power to determine equitable as well as legal claims.

In *Wisdom v. Wisdom,* 155 Wis. 434, 145 N. W. 126, it was held that

"The county court has full jurisdiction, in law as well as in equity, in respect to all controversies involved in the settlement of the estates of deceased persons. Sec. 2443, Stats.; *Brook v. Chappell,* 34 Wis. 405; *Catlin v. Wheeler,* 49 Wis. 507, 5 N. W. 935; *Tyron v. Farnsworth,* 30 Wis. 577; *Carpenter v. U. S. F. & G. Co.* 123 Wis. 209, 101 N. W. 404."

It will appear from the provisions of ch. 165, above set forth and referred to, that the legislature had in mind, in enacting the statutes providing for the presentation and allowance of claims, the giving of an opportunity to all persons having a claim, whether legal or equitable, to file such claim in the matter of the estate of the deceased person, so that the claimant might participate in the distribution of the assets of his estate.

The proceedings on the administration of the estates of deceased persons, in as far as they pertain to creditors, are in many respects like the statutes on assignments for the benefit of creditors, or the federal statutes with respect to insolvent debtors, or the equitable remedies in receiverships. These statutes provide for a simple, efficient, and speedy remedy by and under which the liabilities of the deceased may readily be ascertained and, in accordance with the equitable doctrine that a man must be just before he is generous, with certain exceptions pertaining to exemptions, afford creditors a proper right to the payment of their claims before the assets are distributed among the devisees, legatees, or heirs.

Sec. 3845 is known as sec. 60 of ch. 70 of the Statutes of 1849, and, while not as broad and as inclusive as sec. 3845 as it now appears in our Statutes, was designed by the legislature to include claims and demands based upon contract and to prevent, in substance, actions brought against executors and administrators upon such claims and demands. In the succeeding revisions of the statutes, down to the present day, this section of the Statutes has been somewhat broadened, with the view of authorizing the commencement of actions on claims and demands in the circuit court where the county court cannot give adequate, speedy, or efficient relief.

Sec. 4253, entitled "What actions survive," has heretofore been referred to, and, as above decided, includes the action of waste. Waste may be either permissive or commissive, and in both instances constitutes an action sounding in tort.

In *State ex rel. Owen v. Reisen,* 164 Wis. 123, 159 N. W. 747, it was held that the words "claims, demands and sums" in sec. 1 of ch. 339, Laws 1915, relate to claims arising on contract, and in the opinion in that case it is said:

"This court has repeatedly held that 'claims or demands,' as used in laws relating to claims against cities, relates only to claims arising on contract. *Mason v. Ashland,* 98 Wis. 540, 74 N. W. 357; *Bradley v. Eau Claire,* 56 Wis. 168, 14 N. W. 10; *Kelley v. Madison,* 43 Wis. 638."

In *Knutsen v. Krook,* 111 Minn. 352, 357, 127 N. W. 11, it was held:

"The word 'claim,' as generally employed, has a broad and comprehensive meaning, embracing every species of legal demand. 7 Cyc. 180. But, as employed in a particular statute, its meaning is often restricted and limited, and in statutes providing for the administration of the estates of deceased persons, requiring a presentation of claims against the estate, is by the authorities generally construed as referring to demands of a pecuniary nature and which could have been enforced against the deceased in his lifetime.

(Numerous authorities cited.) The statutes of this state have been so construed. . . . The statute has no application to claims arising in tort, to those arising out of the administration of the estate, nor to claims for legacies or distributive shares of an estate."

Ch. 141 of the Statutes is entitled "Actions and proceedings by and against executors, administrators, heirs, next of kin, legatees, and devisees in certain cases," and sec. 3252 under said chapter, entitled "Tort actions," provides:

"For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrongdoer, an action may be brought by the executors or administrators of the person injured after his death, against such wrongdoer, and, after his death, against his executors or administrators."

The section last named, it was held in *Lane v. Frawley*, 102 Wis. 373, 379, 78 N. W. 593, merely regulated the proceedings in such actions as survive under the provisions of sec. 4253 of the Statutes.

It would thus appear that sec. 3252 expressly contemplated the bringing of an action sounding in tort against the personal representatives of the deceased tortfeasor in the circuit court, or such other court of civil jurisdiction as the legislature might designate.

Sec. 3170 of the Statutes expressly provides that the circuit court shall have jurisdiction of actions of waste, etc. In construing said last named section it is said in *Bandlow v. Thieme*, 53 Wis. 57, 62, 9 N. W. 920:

"We are inclined to think, however, that although the language of the statute does not make the jurisdiction of the circuit court exclusive, in terms, in such an action, from the nature of the action, and the remedies of double damages and injunction, it is exclusive in that court."

By what has been heretofore said it is not our intention to hold that a tort claim which is of such a nature that the tort can be waived cannot, upon the implied-contract feature,

be proved as a claim against the estates of deceased persons. However, it appears quite clear that it was the intention of the legislature that purely tort actions such as the instant one should be prosecuted to judgment either in the circuit court or in some other court upon which jurisdiction to try such action has been expressly conferred. This holding also seems to be in accordance with the long continued practice of the profession with respect to tort claims.

Defendants' counsel also claim that the defendant *Martha Meisser* is not a proper party defendant in this action. In answer to this contention we refer counsel to the provisions of sec. 2604 of the Statutes.

The order of the circuit court overruling the demurrer is sustained.

By the Court.—It is so ordered.

WHALEN, Plaintiff: SCHUMACHER and another, Appellants, vs. MARLING and another, Respondents.

February 9—March 14, 1922.

Subrogation: Mortgage paid by money fraudulently borrowed: Rights of lender: Constructive trusts.

1. G., an owner of a piece of land subject to a first mortgage of $2,000 owned by P. and a second mortgage of $800 to L. G., forged releases of said mortgages and executed four successive mortgages to different persons, each prior mortgage being satisfied by a forged instrument, and the property being inadequate security for the total debt. G. then executed a mortgage on another piece of land to M., falsely representing that it was a first mortgage, whereas prior mortgages had been released by forged satisfactions, and paid the greater portion of the proceeds of the loan from M. to the attorney for P. in satisfaction of his mortgage and interest, but did not secure a written release of P.'s mortgage. *Held*, on the theory of subrogation, that M. was not entitled to the rights of P. under his mortgage, as M. was not to receive a lien on

the land covered by P.'s mortgage and there was no agreement between M. and G. as to the application of the money loaned.

2. G., however, thereby became a constructive trustee for the lender, who was entitled to have the mortgage so paid revived and constitute an existing obligation against G. for the benefit of the lender.
3. One from whom money has been obtained by fraud may follow and reclaim it or have a trust imposed upon the property into which it has gone, so long as it can be distinctly traced and identified, and provided that no injustice is done to one who stands in the position of a purchaser for value without notice.

APPEAL from a judgment of the circuit court for Dane county: OSCAR M. FRITZ, Judge. *Affirmed.*

The appellants, *Schumacher* and *Harper,* express no dissatisfaction with the findings of fact made by the trial court, but assert that the court erred in its conclusions of law and in entry of judgment based thereon. The facts are complicated, many issues are disposed of other than those raised upon this appeal. We shall therefore attempt to state the facts only so far as is necessary to present the questions raised here.

From the findings it appears that in April, 1918, Gunderson sold and conveyed to Clarence F. Green the southwest half of lot 15, block 31, Third addition to Fair Oaks, which description we shall hereafter designate as tract No. 1. That at the time of the conveyance the property was subject to a mortgage executed and delivered by Gunderson to William Pammesberger on June 29, 1917, to secure the payment to him of a note of even date for $2,000, which mortgage was duly recorded in Dane county. That in consideration of the conveyance Green assumed the payment of the note and mortgage to Pammesberger, and at the time executed and delivered a second mortgage to Gunderson upon tract No. 1 for the sum of $800, which was part of the purchase price. That the relation of attorney and client had existed between Gunderson and Pammesberger for a number of years prior to April, 1918.

Upon April 19, 1918, Green, having forged and recorded a discharge of the Pammesberger mortgage and the mortgage which he had given to Gunderson, executed a mortgage to the Northwestern Securities Company to secure the payment of $1,600. On July 10, 1918, he executed a mortgage upon tract No. 1 to *William G. Schumacher* to secure the payment of $1,300, and on August 3, 1918, Green executed to *J. C. Harper,* as guardian for Nellie Wiswall, a mortgage upon tract No. 1 to secure the payment of $1,800, the successive loans being secured by forged and recorded satisfactions of prior mortgages.

On January 16, 1919, Clarence F. Green executed to *William P. Whalen* a mortgage upon tract No. 1 to secure the payment of $2,000, falsely and fraudulently representing to *William P. Whalen* that the mortgage which Clarence F. Green then executed and delivered to *Whalen* was a first-mortgage incumbrance, it appearing that Green had forged satisfactions of the prior incumbrances, and that in truth and in fact said tract No. 1 was on January 16, 1919, subject to five prior mortgages to secure loans aggregating $7,500, none of which had been paid or satisfied, but in relation to which forged releases had been recorded. That the value of tract No. 1 was and still is wholly inadequate security for all of the indebtedness which was to be secured by said prior mortgages.

That on April 26, 1919, without the knowledge of Gunderson or Pammesberger, Clarence F. Green obtained $2,200 on a loan from *W. A. Marling* and *Celia E. Marling,* trustees, and as security therefor executed a mortgage upon another parcel of real estate which we shall designate as tract No. 2, which Green falsely and fraudulently represented to be unincumbered, which at that time it appeared to be by reason of forged releases of prior mortgages which Green had caused to be executed and recorded. That the trustees in good faith relied upon the false representations made by Green and upon the records or releases and were induced thereby to make a loan of $2,200. That the said

sum was obtained by Green from the trustees under such circumstances as to entitle the trustees to immediate recovery from Green of the sum of $2,200.

That on April 26, 1919, $2,000 of the $2,200 fraudulently obtained by Green from the *Marlings,* together with the interest accrued on the note to Pammesberger, were paid by Green to Gunderson as attorney for Pammesberger in satisfaction and discharge of the latter's note and mortgage by Green then delivering to Gunderson a cashier's check for $2,000 issued by the First National Bank of Madison, payable to the order of Green and indorsed by him; that Gunderson then, in good faith and without any knowledge or notice of any defect in the title of Green, accepted said cashier's check, in the usual course of business, in payment of said note for $2,000, which was then held and owned by Pammesberger, and thereby became a holder in due course of said cashier's check, on behalf of Pammesberger. That at said time Green informed Gunderson that he did not desire a written satisfaction of the mortgage executed by Pammesberger; that up to said time and thereafter and until shortly before May 23, 1919, Pammesberger had been unable to find the note and mortgage.

That on April 26, 1919, Gunderson deposited said cashier's check for $2,000, paid to him on said day by Green, as aforesaid, at the Merchants & Savings Bank at Madison, and received a certificate of deposit for $2,000, payable to the order of Gunderson.

That on May 1st an arrangement was entered into between Pammesberger and Gunderson. Gunderson indorsed the certificate for $2,000 to Pammesberger, but continued to retain the certificate in his custody. That shortly prior to May 23, 1919, Pammesberger found the missing note and mortgage and so informed Gunderson, but did not immediately present the same to Gunderson or request him to deliver the certificate of deposit. That on May 22d and May 23d Gunderson and Pammesberger were advised by *Whalen* that he, *Whalen,* claimed an interest in the said deposit of $2,000, and on May 23, 1919, Gunderson was in-

formed by the defendants *Harper* and *Schumacher* that they each claimed that they were entitled to the application of the certificate of deposit in satisfaction of William Pammesberger's note and mortgage, and request was then made by *Schumacher* of Pammesberger that he immediately execute and deliver to Gunderson, for the benefit of all subsequent mortgagees, a written satisfaction of the said mortgage to William Pammesberger. That on May 23, 1919, before the service of any papers in this action, Pammesberger executed and delivered to Gunderson a written satisfaction of the mortgage. That thereafter the satisfaction of mortgage, together with the note and certificate of deposit for $2,000, were left in the hands of Gunderson subject to such disposition as might be made thereof in an action which it was then believed was about to be commenced. Pammesberger receipted in writing for the certificate of deposit, and all documents were left with and ever since have been in the custody of Gunderson.

That up to and including May 23, 1919, neither Gunderson nor Pammesberger had any knowledge or notice of any defect in the title of Green to the fund represented by the cashier's check for $2,000.

That until May 23, 1919, the Northwestern Securities Company, *W. G. Schumacher, J. C. Harper,* and *Whalen* had no knowledge or information as to Clarence F. Green's payment on April 26, 1919, of the note for $2,000 then held by William Pammesberger, and that none of the defendants nor the plaintiff did any act or in any manner changed his status in relation to said mortgage and to the real estate known as tract No. 1, by reason of said payment having been made on April 26, 1919.

That said *Whalen* never had any interest in the $2,000 paid to Gunderson on April 26, 1919. That throughout all the transactions involved in the action the defendant L. C. Gunderson, Ingeborg Thompson, as well as all of the other parties to this action with the exception of Clarence F. Green, acted honestly and in good faith. Neither L. C.

Gunderson nor any of those parties with the exception of Clarence F. Green has been guilty of any fraudulent misrepresentation, concealment, or deceit, none of them have acted in collusion in any respect for any wrongful or unlawful purpose in connection with Clarence F. Green, or any other person, and none of them are either directly or indirectly responsible for any of the frauds or misconduct committed by the defendant Clarence F. Green.

Upon the points material here the court concluded as a matter of law "that the certificate of deposit issued by the Merchants & Savings Bank of Madison, Wisconsin, under date of April 26, 1919, for $2,000, payable to the order of L. C. Gunderson and indorsed by him to the order of William Pammesberger, is the absolute property of William Pammesberger and none of the other parties herein have any right or interest therein," and dissolved the injunction. Further, "that the satisfaction of mortgage which is recorded in Volume 239 of Mortgages on page 240 in the office of the register of deeds for Dane county, and which purports to have been executed by William Pammesberger, is null and void and should be canceled of record. That the satisfaction of said mortgage by William Pammesberger, which he executed and delivered into the custody of L. C. Gunderson under date of May 23, 1919, should be canceled and adjudged null and void and delivered to the clerk of this court and by him canceled. That the indebtedness of $2,000 and interest, which is secured by said mortgage to William Pammesberger, shall be revived and constitute a valid and existing obligation solely as against the defendant Clarence F. Green, for the benefit of the defendants *W. A. Marling* and *Celia Marling,* as trustees of the estate of George W. Marling, so far as necessary to support the lien of said mortgage to William Pammesberger, and that said mortgage to William Pammesberger, which mortgaged tract No. 1, shall be a valid and existing lien for the payment of said indebtedness of $2,000, with in-

terest thereon at the rate of six per cent. payable semi-annually from April 26, 1919, in favor of the defendants *Marling,* and they are entitled to be subrogated to the rights of said William Pammesberger as to said mortgage, and for that purpose said William Pammesberger shall assign said mortgage and the note secured thereby to said *W. A. Marling* and *Celia Marling,* as such trustees. That the $800 mortgage from Clarence F. Green to L. C. Gunderson, recorded in Volume 242 on page 386, be adjudged to be fully satisfied and discharged."

From judgment entered accordingly the defendants *Schumacher* and *Harper* appeal.

For the appellant *Schumacher* there were briefs by *Kroncke, Sauthoff & Murphy,* attorneys, and *H. H. Puetz,* of counsel, all of Madison, and oral argument by *Mr. George Kroncke* and *Mr. Puetz.*

J. C. Harper of Madison, *in pro. per.*

For the respondents *Marling* there was a brief by *Olin, Butler, Thomas, Stebbins & Stroud* of Madison, and oral argument by *Byron H. Stebbins.*

ROSENBERRY, J. The appealing defendants do not in any respect assail the findings of fact made by the trial court, but contend that the court erred in its conclusions of law in applying the doctrine of subrogation to the findings of fact. The appealing defendants argue that subrogation is not for strangers; that the payment of the money by Green to Gunderson, who received it as attorney for Pammesberger, discharged the Pammesberger debt and extinguished the mortgage; that the equities of the various parties are equal and in that situation the law should prevail; and in a reply brief argue that the equities of the appealing defendants are superior to those of the respondents *Marling.*

We are convinced that if the rights of the respondents *Marling* depend upon the law of subrogation, the appealing defendants must prevail. The *Marlings* had no interest in

tract No. 1 and could not have been obliged or compelled to pay the debt secured by the Pammesberger mortgage. Although Green obtained the fund from the *Marlings* by fraudulent representations, there was no understanding or agreement between Green and the respondents *Marling* that the money should be used to discharge any particular obligation of Green's, much less the Pammesberger mortgage. Nor were the respondents *Marling* ever to secure any lien upon the property covered by the Pammesberger mortgage. The respondents *Marling* accepted as their sole security the mortgage upon tract No. 2 without inquiry as to what use or disposition was to be made of the fund. This position is fully sustained by the authorities. *Murphy v. Baldwin,* 159 Wis. 567, 150 N. W. 957; *Watson v. Wilcox,* 39 Wis. 643; *Ætna L. Ins. Co. v. Middleport,* 124 U. S. 534, 8 Sup. Ct. 625; *Acer v. Hotchkiss,* 97 N. Y. 395.

The respondents *Marling* seek to sustain the judgment by the application of principles of law relating to constructive trusts. Their argument is that Green's fraud in obtaining the money of respondents *Marling* made him a constructive trustee thereof, impressed it with a trust in their favor, and gave them the right to follow it into and reclaim it out of the Pammesberger mortgage which it was used to pay, since there are no intervening rights or equities on the part of appellants *Schumacher* and *Harper,* or any one else. The principle is firmly established that one from whom money has been obtained by fraud may follow and reclaim it, or have a trust imposed upon property into which it has gone, so long as it can be distinctly traced and identified, and provided that no injustice is done to one who stands in the position of a purchaser for value without notice. 39 Cyc. 528, 533, 545, 546; 26 Ruling Case Law, 1232, 1348, 1351; *Bent v. Barnes,* 90 Wis. 631, 64 N. W. 428; *Wisdom v. Wisdom,* 155 Wis. 434, 145 N. W. 126; *Emigh v. Earling,* 134 Wis. 565, 115 N. W. 128; *Boyle v. Northwest-*

ern Nat. Bank, 125 Wis. 498, 103 N. W. 1123, 104 N. W. 917; *Hyland v. Roe,* 111 Wis. 361, 87 N. W. 252; 3 Pomeroy, Eq. Jur. (4th ed.) § 1053.

That Green obtained the $2,000 in question under such circumstances as to make him a constructive trustee thereof and to entitle the respondents *Marling,* from whom he obtained it, to reclaim it or to follow it, seems too clear to admit of argument. The appellants contend that by the payment of the debt owing by Gunderson to Pammesberger, to secure which the mortgage was given, the mortgage lien was destroyed, or at least merged in the estate of Green, the owner of the property, and hence was in his hands a nullity; that this having occurred, the rights of the subsequent mortgagees attached, and that the obligation so extinguished by payment cannot be revived so as to deprive them of their rights thus acquired, citing *Rice v. Winters,* 45 Neb. 517, 63 N. W. 830. In *Rice v. Winters* we find no fact alleged in the complaint or found by the court from which it may be inferred that the party asserting a right of subrogation was defrauded, neither was there any right asserted to follow the fund under the doctrine of constructive trusts. While *Watson v. Wilcox,* 39 Wis. 643, is there cited to the proposition that the doctrine of subrogation would not be applied where one having no interest to protect voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, nevertheless, as we understand the cases of *Charmley v. Charmley,* 125 Wis. 297, 103 N. W. 1106, and *Poluckie v. Wegenke,* 137 Wis. 433, 119 N. W. 188, this court would have held under the facts in *Rice v. Winters* that the party claiming the right of subrogation was entitled thereto, although the Nebraska court held the contrary. *Hughes v. Thomas,* 131 Wis. 315, 111 N. W. 474; *Wilton v. Mayberry,* 75 Wis. 191, 43 N. W. 901. So that if it were applicable to the present

situation, as it is not, we could not apply the reasoning of the court in *Rice v. Winters* in the determination of the issue here presented.

Disregarding the void satisfactions and regarding the facts as they actually existed on the 26th day of April, 1919, there was upon tract No. 1 the Pammesberger mortgage, which was a first mortgage, the Northwestern Securities Company mortgage, which was a second mortgage, the *Schumacher* mortgage, which was a third mortgage, the *Harper* mortgage, which was a fourth mortgage, and the *Whalen* mortgage, which was a fifth mortgage. We treat the mortgage given by Green to Gunderson as paid and discharged, as found by the trial court. Green was the owner of the fee. With the title in this situation, he procures from the respondents *Marling* by fraud and misrepresentation the sum of $2,000, which is traced directly into the hands of Gunderson, where it is paid for the satisfaction of the Pammesberger mortgage. This fund was one which the respondents *Marling* were entitled to follow into the hands of any person to whom it should come who had notice, or into any property into which it might be traced, purchased, or procured by Green. To present the facts more graphically it may be said that tract No. 1 was cut up into interests: a $2,000 interest which secured the payment to Pammesberger of the amount loaned by him to Gunderson; a $1,600 interest which secured the payment of the amount loaned to Green by the Northwestern Securities Company; a $1,300 interest which secured the payment of $1,300 loaned to Green by *Schumacher;* an $1,800 interest which secured the payment of the amount loaned by *Harper* to Green; and a $2,000 interest which secured the loan made by *Whalen* to Green. Pursuant to the agreement contained in his deed, Green paid Gunderson's debt to Pammesberger. By that payment Green's liability to Gunderson was discharged and the $2,000 interest in tract No. 1, which secured the payment of Gunderson's debt to Pammesberger, was

released. The trial court said that this $2,000 interest so released should stand as security for the benefit of the respondents *Marling,* who had fraudulently been deprived of the money which secured the release, and that such mortgage interest should be revived and constitute a valid and existing obligation solely against the defendant Clarence F. Green for the benefit of the respondents *Marling.* The interest of every subsequent mortgagee remained exactly as it was before the money of the respondent mortgagees had been used to satisfy the debt secured by the Pammesberger mortgage. No subsequent incumbrancer has in any degree or to any extent changed his position by reason of such payment nor is he in any worse position than he would have been had the payment not been made. It is true, as argued, that upon the payment of the debt owing by Gunderson to Pammesberger, which was secured by the $2,000 interest in the property, in the absence of countervailing equities the second mortgage would have become a first mortgage and each subsequent mortgage would have moved up one place. Have such subsequent incumbrancers equities superior to those of the respondents *Marling,* who, by fraud, were induced to furnish the money which procured the release? We think not. That which Green purchased with the money so fraudulently procured, the release of the $2,000 interest represented by the Pammesberger mortgage, should in equity stand as security for the payment of the *Marlings,* who furnished the fund. The subsequent incumbrancers do not stand in the position of a purchaser for value without notice. They have parted with nothing, they have not changed their position, their rights, equitable and legal, remain exactly as they were before the payment was made. The principle contended for by the subsequent incumbrancers would, if applied, entirely defeat the right of subrogation in most cases, for if in every instance where there was a satisfaction of a prior lien all subsequent incumbrancers could assert a vested right in the

benefits thereby accruing to them, no relief could be granted to the person claiming the right of subrogation in most cases. We see no reason why the principle applicable in subrogation is not applicable here, and that therefore the interest which was released by the payment of the Pammesberger mortgage must stand charged for the benefit of those from whom Green fraudulently procured the fund.

In this case innocent parties must suffer. The burden of wrongdoing falls upon those who have done no wrong, which is not infrequently the case. The parties are in a court of equity. Their rights must be determined in accordance with established equitable principles. If the doctrine of constructive trusts, which is well established in our law, is to be given any effect whatever, we see no reason why that which was procured by Green by means of the proceeds derived from his fraud should not stand for the benefit of those who furnished the fund which procured it. The judgment of the trial court is right and must be affirmed.

By the Court.—So ordered.

APPLICATION OF GEHRKE and wife: WISCONSIN RIVER POWER COMPANY, Appellant.

February 10—March 14, 1922.

Eminent domain: Damage to landowner by construction of dam: Alternative causes of damage: Excessive rainfall: Disposition of case.

In proceedings by landowners to appraise the damages accruing from the construction of a dam which it is claimed caused a raising of the ground level of the water on their land, where there was evidence that the condition of the petitioners' lands might have resulted from excessive rainfall as well as from the construction of the dam, an order appointing commissioners to appraise the damages will be reversed, with instructions to dismiss the petition without prejudice to petitioners' right to institute new proceedings if within the period of the statute of limitations the lands remained in a wet condition during a continued period of normal rainfall.

APPEAL from an order of the county court of Sauk county: JAMES H. HILL, Judge. *Reversed.*

The appeal is from an order appointing commissioners in condemnation proceedings.

E. J. B. Schubring of Madison, for the appellant.

For the respondents there was a brief by *Grotophorst & Quale* of Baraboo and *H. H. Thomas* of Madison, and oral argument by *Mr. Thomas.*

OWEN, J. The appellant owns and maintains a dam for the purpose of generating electric power, which dam extends across the Wisconsin river about a mile north of the village of Prairie du Sac. The construction of this dam was commenced in 1910. In 1913 it raised the water five feet; in 1914 about twenty-five feet; in 1915 the water was raised another three feet; in the latter part of 1915 or 1916 it was raised another foot, and in the winter of 1918, or the spring of 1919, it was raised to its present height, so that the total height is now about thirty-three feet.

Petitioners' lands are located in a valley which drains into the Wisconsin river, the general direction of which is north from the river and about a half mile from the pond created by the dam. The petitioners, who claim damage to their lands by reason of the construction of the dam, instituted these proceedings in the nature of condemnation to have the damage appraised. The petition alleges that

"Although the waters of the mill-pond do not border directly upon the lands of your petitioners, the raising of the water in the mill-pond has raised the water level and has interfered with the natural surface and underground drainage of petitioners' lands, and the water having been set back thereon, petitioners' lands, as a result, have become wet and soggy and unfit for use. That as a result of raising the water level in the vicinity of said mill-pond near the lands of petitioners, the underground drainage is impaired and petitioners' lands . . . have been rendered wet and soggy and unfit for use, whereas prior to the con-

struction of said dam and in the ordinary course of nature said lands were naturally drained and were capable of, and were used for, agricultural purposes."

The evidence shows that up to the year 1915 petitioners' lands were dry and suitable for agricultural purposes; that during the period from 1915 down to the time of the hearing the lands were wet and soggy, rendering them entirely unfit for agricultural purposes; that this was the condition of the lands during that period is not a matter of dispute. The controversy is as to the reason for the wet condition of the lands.

On the part of the petitioners it is argued that as the lands were dry and tillable prior to the construction of the dam, and their wet and untillable condition has arisen since its construction, the raising of the water by the dam, thus preventing the underground drainage down through the valley to the river, is the cause of their present condition. The defendant introduced evidence to show that below petitioners' lands an impervious bank of clay, more than thirty feet in depth, extends clear across the valley, which bank is so impervious as to shut off from petitioners' lands the water from the dam; that this clay bank extended below the water level before the dam was put in, and that as the drainage from the upper part of the valley could not percolate through this clay bank it necessarily went under it, and as this was below the water level prior to the raising of the dam, the raising of the dam had no effect upon the underground drainage of the upper part of the valley. Drainage experts testified that because of this fact the ground water curve, instead of being a gradual rise and extending back probably several hundred feet, as would be the case with sand, extends back but a short distance and rises abruptly to the surface. The defendant also claims that the wet condition of petitioners' lands is due to abnormal rainfall and not to an interference caused by its dam with the normal drainage from this valley.

The evidence showed that the mean annual rainfall for this territory from 1895 to 1910 was twenty-eight inches; from 1889 to 1917 it was thirty and seven-tenths inches; from 1911 to 1917 it was thirty-five and three-tenths inches; and from 1911 to 1919 it was thirty-four and two-tenths inches. These statistics show an abnormal rainfall for that region coincident with the beginning of the construction of the dam, and, without undertaking to enter into a detailed discussion of the evidence, we will content ourselves by saying that it is obvious that the condition of petitioners' lands might have resulted either from the interference with drainage by the construction of, and consequent raising of the water by, the dam, or it might have resulted from the excessive rainfall, and that at the time of the trial, based upon the evidence then at hand, a conclusion that the condition resulted from one or the other cause was no more than a mere guess or conjecture. If the ground level of the water in petitioners' lands is due to the construction and maintenance of appellant's dam, then petitioners are entitled to damages. But the unfortunate situation for the petitioners is that coincident with the building of the dam an abnormal rainfall set in which persisted down to the trial of the case; and while theorists may easily convince themselves that the condition of the lands is due to one or the other of these causes, the real cause cannot be established with any degree of certainty. This case reminds the writer of *Dickson v. Pritchard*, 111 Wis. 310, 87 N. W. 292, in which the court said:

"Plaintiffs' case, as to this feature of it, was based entirely upon theory, speculation, and conjecture. It was their misfortune that definite testimony could not be procured. Recoveries cannot be allowed that have no other basis than mere speculation or conjecture. . . . The testimony in this regard is so speculative and conjectural that we are not able to see how, if a verdict had been rendered for the plaintiffs, it should have had any substantial basis to rest upon."

It is well settled that "where the proof discloses that a given result may have occurred by reason of more than one proximate cause, and that a jury can do no more than guess or conjecture as to which was in fact the efficient cause, the submission of such a choice to the jury has been consistently condemned by this court." *Matuschka v. Murphy,* 173 Wis. 484, 488, 180 N. W. 821, and cases there cited. See, also, *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729.

The conclusion of the trial court, therefore, that the condition of petitioners' lands was the result of the construction of the dam, cannot be sustained. It occurs to us, however, that if the lands should remain in their wet condition during a continued period of normal rainfall, the deduction might be justified that their wetness was due to the construction and maintenance of the dam. We feel that should this appear at any time prior to the running of the statute of limitations the petitioners should be allowed to institute new proceedings for the appraisement of their damages, and we will therefore reverse the order appealed from, with instructions to dismiss the petition, but without prejudice to the right of petitioners to re-institute proceedings at any time within the bar of the statute of limitations.

By the Court.—So ordered.

BROWN and another, Appellants, vs. MARTY, Respondent.

February 11—March 14, 1922.

Brokers: Commission dependent on payment of purchase price: Evidence: Sufficiency: Voluntary abandonment of sale.

1. A special verdict finding that plaintiffs were not entitled to a commission for selling defendant's land unless the purchaser should make a deferred payment thereon is not sustained by evidence which at most showed that plaintiffs agreed to wait until the date of such payment for their commission.

2. Even though the brokers' right to a commission depended on the purchaser meeting a deferred payment for the land, they can recover their commission where the evidence showed that at the time the payment was due the purchaser had sufficient money in the bank to meet it, but that the contract of sale had been rescinded by the voluntary agreement between the vendor and purchaser.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover a commission of $460 claimed to have been earned on the sale of defendant's farm. The contract for commission was in writing, and it is admitted that plaintiffs on September 11, 1911, secured a purchaser, Olson, ready, able, and willing to buy on the terms stated in the contract except that he could pay down only $500 in cash instead of $2,000. Defendant accepted the terms and a land contract with Olson for the purchase of the farm was entered into, and $500 cash was paid and a further cash payment of $2,000 was to be made January 1, 1920.

Defendant claims that at the time Olson secured the land contract plaintiffs, through *Brown,* agreed that no commission should be paid unless Olson paid the $2,000 on January 1, 1920. Plaintiffs denied this. On December 18, 1919, Olson assigned to defendant the land contract entered into September 11, 1911, and defendant afterwards sold his farm to another party.

The jury found that "on the day that Mr. Olson and *Mr. Marty* signed the contract dated September 11, 1919, *Mr. Brown* stated that the plaintiffs were not entitled to receive a commission unless $2,000 was paid by Mr. Olson on the purchase price."

The court entered a judgment dismissing the action, and the plaintiffs appealed.

For the appellants there was a brief by *Hill, Spohn & Thomann* of Madison, and oral argument by *W. H. Spohn.*

For the respondent there was a brief by *Gettle & Torge* of Madison, and oral argument by *A. T. Torge.*

VINJE, C. J. The judgment must be reversed for two reasons: First, because the evidence does not sustain the verdict, and second, even if it did, plaintiffs would be entitled to recover.

The only competent evidence on behalf of the defendant to sustain the verdict is the testimony of his son, Matt Marty, and that of his married daughter, Rose Brink. Matt testified:

"The conversation between me and *Brown* in my father's presence relative to commission was when the papers were signed and he handed over the $500. *Mr. Brown* I remember of asking him whether he wanted his commission, expected his commission now or January 1st, when the deal was to be closed up, and he says: 'Yes, sir, any time will do.' I don't remember whether anything was said about the $2,000 payment when I was there. They most likely had that all made out before I got there; not that I remember of, no."

Rose Brink testified:

"I am a daughter of *Leonard Marty.* My husband's name is David Brink. I was present when Mr. Olson and my father and mother and Matt were there at the farm, but I heard not much of the deal. In regard to the payment of a commission, I heard mother say something to father, I didn't hear what she said, and my father says to *Mr. Brown:* 'I don't pay you until the first of March when the final papers—first of January when the papers are made out and the $2,000 paid down.' *Mr. Brown* answered, 'No, no.' "

This evidence fails entirely to establish the fact that no commission was to be paid unless the $2,000 was paid January 1st. At best it only establishes the fact that plaintiffs agreed to wait for their commission until January 1st, when all the parties expected the $2,000 would be paid, and when it would have been paid but for the voluntary cancellation

of the land contract, for which cancellation plaintiffs were in nowise responsible. The evidence showed that Mr. Olson was a man of good financial standing and that he had on deposit in his bank more than $2,000 on January 1st, subject to check.

So even if plaintiffs agreed that no commission should be paid unless Olson paid the $2,000 January 1st, such agreement would at best only guarantee the ability of Olson to pay it when due. It would not mean that the defendant, by voluntarily abandoning the contract, could escape the payment of a commission. *Dean v. Wendeberg,* 175 Wis. 513, 185 N. W. 514. It was shown that Olson had and could have paid the money. It will therefore be assumed that the defendant, for reasons of his own, chose to cancel the bargain. This he could not do without paying the commission even if the agreement was as found by the jury. Such agreement contemplated defendant's readiness to carry out his contract and that the commission failed only in case the purchaser was unable to carry out his part. No such failure is shown.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for plaintiffs for $460 and costs.

IN RE ANDERSON: ANDERSON, General guardian, Appellant, vs. ROCKDALE SCHOOL DISTRICT, Respondent.

February 11—March 14, 1922.

Insane persons: Sale of lands: Offer at fair value: Higher offer with ulterior purpose.

Where an interest in real estate of an incompetent was offered for sale to a school district at a certain price, it was the duty of the court to accept a *bona fide* offer of a substantially higher price from a third party, though it was of the opinion that such offer was made for the sole purpose of hindering the school district and causing it expense, the interest of the incompetent being the dominant consideration.

APPEAL from an order of the county court of Dane county: A. G. ZIMMERMAN, Judge. *Reversed.*

Anna Anderson, an incompetent, is the owner of a one-eighth interest in eight lots which were desired by a school district which was under the necessity of erecting a new and modern schoolhouse. On January 17, 1920, *T. J. Anderson,* brother of the incompetent, made a petition to the county court of Dane county to sell the interest of the incompetent. Albert L. Anderson was appointed special guardian and on the same day made a contract of sale to the school district for $100. The school meeting was held on the 12th day of February, 1920. On the 18th day of March, 1920, an order was made by the county court of Dane county authorizing and empowering Albert L. Anderson, special guardian of *Anna Anderson,* incompetent, to enter into an agreement to sell her interest to the school district for the sum of $100. Thereafter difficulties arose between the district and members of the Anderson family, including *T. J. Anderson* and Albert L. Anderson, and the school district was obliged to commence condemnation proceedings, which it did on the 17th day of December, 1920. The incompetent was not made a party to these proceedings for the reason that there was then in existence the agreement referred to. The county court found that $100 was a fair market value of the land. In the condemnation proceedings the commissioners fixed the value of each one-eighth interest at $100. There was an appeal in the condemnation proceedings, which was heard in this court in May, 1921. On May 10, 1921, *T. J. Anderson,* as general guardian, presented a petition to the county court setting forth that B. G. Anderson offered to pay $300 for the interest of the ward in the eight lots and asked that the agreement to sell be not confirmed. Upon the proceedings for confirmation there was a contest as to the value, the Andersons claiming that the interest of the ward was worth from $250 to $300, and there being evidence of the fact

that it was worth from $50 to $60. The court found that $100 was the fair value of the property, that the offer made by B. G. Anderson was not in good faith but for the purpose of delaying the proceedings by which the district hoped to acquire title to the property in question; and while the court was of the opinion that it was the duty of the court to look after the interest of the incompetent, yet the court must deal in good faith with other parties who deal with the ward, and that such was especially true in this case where the other party is a public institution, a governmental subdivision, that is acquiring the property, not for private or commercial purposes but for a public purpose. The court then indicated that he would accept the $300 on condition that the purchaser enter into a written contract that he would sell the interest thus acquired to the district at the price which might be found in condemnation proceedings in circuit court. This proposal was refused by B. G. Anderson, and the court then found that the offer of B. G. Anderson was not made in good faith but for the sole purpose of hindering and delaying and causing the school district expense. The court entered an order confirming the sale pursuant to the contract entered into with the special guardian, Albert L. Anderson, for the sum of $100, and from the order the general guardian appeals.

For the appellant there was a brief by *Gettle & Torge* of Madison, and oral argument by *A. T. Torge.*

For the respondent there was a brief by *C. R. Clarke* of Cambridge and *Gilbert, Ela & Heilman* of Madison, and oral argument by *Emerson Ela.*

ROSENBERRY, J. The situation presented by the facts in this case is at least very unusual. Were this court at liberty to deal with this matter as a private matter, it might very heartily approve of the course adopted by the trial court. We are cited to no case, however, and we find none, which sustains the position taken by the trial court. As

stated by the trial court, it is the duty of the court to protect and guard the interests of the incompetent. We think that duty is fixed and certain, and that where, as here, property of the incompetent is being offered for sale and a substantially higher price is offered for it, it is the duty of the court to consider the offer, and if *bona fide* to accept it, and that it is not a proper ground of refusal of the offer that the court, in looking beyond the offer, is of the opinion that it is for some ulterior purpose. The interest of the incompetent is the dominant consideration. While the situation here is perplexing and irritating, we do not see that it affords any legal justification for the refusal of the offer, even though the interests of a school district may be affected. We see nothing in the case that justifies a departure from well established legal principles.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

CITY OF MADISON, Respondent, vs. FULLER & JOHNSON MANUFACTURING COMPANY, Appellant.

February 11—March 14, 1922.

Vacation of street: Statute limiting time to attack attempted vacation: Construction: Legislative power: Action of common council: Validating imperfect vacation.

1. Sec. 926—125*q*, Stats., requiring an action to set aside any final order of any circuit court, or action of the common council of a city, for the vacation of a street to be begun within six months from the publication of the statute, and validating such attempted vacation at the end of such six months, is one of limitation and repose and requires a fair and reasonable construction to carry out its manifest purpose of putting a quietus on subsequent attempts to overturn proceedings in regard to the vacation of streets.

2. Since the legislature has the primary power as to the laying out and vacating of public highways, even though exercised through the common council, the legislature can ratify that which was attempted to be done, or was imperfectly done, at some prior time, as it did by sec. 926—125*q*, Stats.
3. The fact that a complaint to require defendant to remove obstructions from a street omitted any reference to a judgment vacating the street rendered subsequent to the erection of buildings thereon under permit by the city, does not affect the character of the action, which is an attack on the vacation of the street.
4. Where the common council of a city accepted a deed to property for a street, which deed was expressly conditioned on the vacation of another street, its acceptance of the deed was equivalent to a vacation of such street, which action became binding, if not attacked within six months, under said sec. 926—125*q*.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Prior to October, 1891, Dickinson street had been regularly platted and theretofore traveled to some extent as a public highway in the city of *Madison.* As so platted it was sixty-six feet wide. At that time the defendant owned and occupied for factory purposes blocks 217 and 219 on one side of Dickinson street and blocks 222 and 223 on the opposite side thereof, the latter two blocks extending to Water street, which ran practically alongside of the then Catfish, now Yahara, river, which connects Lakes Mendota and Monona.

East Mifflin street crossed Dickinson street and separated blocks 219 and 222 from blocks 217 and 223; East Washington avenue was substantially parallel with East Mifflin street and separated therefrom by blocks 217 and 223.

On November 13, 1891, after application by defendant, the common council of the plaintiff, by resolution, gave permission to the defendant to use and occupy for buildings, workshops, and additions to its manufacturing plant that portion of said North Dickinson street lying between East

Washington avenue and East Mifflin street and between blocks 217 and 223, to erect and maintain thereon such buildings, workshops, and additions to its manufacturing plant as defendant might deem expedient. It provided, however, that a driveway should be left on the southwest side of such street or on defendant's land adjoining such side of sufficient width to permit teams to pass between said East Washington avenue and East Mifflin street.

The permission thus given was acted upon, and in the following year defendant built upon the northeast fifty-one feet of said North Dickinson street between East Mifflin street and East Washington avenue by erecting thereon a building used in connection with its industrial plant, and continued such use thereafter. In August, 1919, a portion thereof abutting on East Washington avenue was partially removed to make room for a new and more substantial factory building then started to be erected by defendant and running along East Washington avenue with the corner thereof established at substantially the corner line of North Dickinson street and said East Washington avenue; so much of such structure as had been used for blacksmith-shop purposes remaining as before, and the portion still left on the East Washington avenue end still being used for storage purposes.

In 1903 the directors of the Madison Park and Pleasure Drive Association sent a communication to the common council of the plaintiff city as to its proposed improvement of the Yahara river and banks between Lakes Mendota and Monona. This involved, among other things, the widening of and shifting the location of Water street (now Thornton avenue), which ran alongside the Yahara river, from its then width of about fifty feet to a proposed width of sixty-six feet, and to shift the same from its then location onto blocks 222 and 223 so as to allow the maintaining of suitable banks between that and the Yahara river and to permit of suitable approaches for the bridges then built or presently to be con-

structed, and all to be at a higher elevation so as to permit of navigation along the Yahara river as proposed to be improved, straightened, and deepened. It also recited that negotiations had been had between such directors and the defendant looking to the securing of a deed from the defendant of sufficient lands on the ends of said blocks 222 and 223 to effectuate the proposed plan for improvement along the river, including the widening and shifting of Water street, in return for a vacation by the city of the strip of land occupied by Mifflin street between said blocks 222 and 223 and the fifty-one feet above described in front of block 223 in North Dickinson street, the amount of land so suggested to be conveyed by the defendant being substantially equivalent in amount to that covered by the proposed vacation.

Thereupon a resolution was proposed at a meeting of the common council of the plaintiff reciting the communication from the Park and Pleasure Drive Association as aforesaid and reciting as follows:

"Now, therefore, be it hereby resolved, that it is the sense of the common council of the city of *Madison* that it would be for the interest and welfare of the city of *Madison* to have vacated the portions of Dickinson and East Mifflin streets above described in consideration of the said *Fuller & Johnson Manufacturing Company* conveying good title, by proper conveyance, to the city of *Madison,* for street and park purposes, the lands as described in said report of said directors of the Madison Park and Pleasure Drive Association.

"Be it further resolved, that before said streets are vacated, said *Fuller & Johnson Manufacturing Company* shall execute a proper deed of conveyance, conveying good title to said city of *Madison* to the lands described in said report of said directors, and place the said deed in escrow in the hands of Rufus B. Smith, city attorney for said city, said deed to be retained by him until said portion of said streets shall be vacated, whereupon said deed shall be delivered by said Rufus B. Smith to the city of *Madison.*"

Subsequently, by amendment, so much of the resolution as pertained to the vacation of the strip in question here on Dickinson street was stricken out and the resolution as so amended adopted on October 9, 1903.

In January, 1904, an application was made by the defendant to the circuit court for Dane county for the vacation of said blocks 222 and 223 and other property and notice thereof given to the plaintiff.

The judiciary committee of the common council acted upon said notice and recommended that the city attorney be directed to appear for the city and consent on its behalf to such vacation. The common council refused to adopt so much of the recommendation as related to the fifty-one feet in question here and directed the city attorney to oppose such vacation, but adopted the recommendation as to the vacation of Mifflin street.

In such action the then city attorney appeared and consented to the vacation of Mifflin street but objected to the vacation of the fifty-one feet on Dickinson street. The said action came on for hearing April 6, 1904, and the plaintiff herein appeared by the city attorney. A judgment was then entered vacating all of said block 222 and all of that part of block 223 lying west of the Chicago & Northwestern Railway right of way, together with Mifflin street lying between said two blocks, and also the northeast fifty-one feet of Dickinson street adjoining block 223, being the particular strip here involved, and adjudging that the title to said Mifflin street as above described and of the northeast fifty-one feet of Dickinson street as aforesaid be vested in the defendant herein.

On April 18, 1904, the defendant conveyed by written deed to the plaintiff a strip off the northeasterly side of block 222 and also of block 223. Such deed recited a consideration of one dollar and other valuable considerations and also provided as follows:

"This deed is made in consideration of the vacation of Mifflin street between Dickinson street and Water street,

and the northwest [*sic*] fifty-one (51) feet of Dickinson street between Mifflin street and Washington avenue, which has been done by a judgment entered in the circuit court for Dane county, aforesaid, vesting the title to said portions of said streets in the grantor; but if the grantor shall become divested of the title to said portions of said Mifflin and Dickinson streets without its consent, or by reason of any action or proceeding by the grantee, or any person, persons or corporation on its motion or in its behalf, which shall reverse, vacate or annul the judgment of the circuit court, aforesaid, then the title to the lots of land hereinbefore described shall revert to and vest in and belong to the grantor herein, its successors and assigns forever."

Such deed was recorded July 4, 1904.

On April 26, 1904, a resolution was adopted by the common council of plaintiff to the effect that said Water street be relocated so that it substantially included the strip conveyed to the city by defendant from the northeasterly side of blocks 222 and 223 by the deed of April 18th. On the same date the common council, also by unanimous vote, accepted the aforesaid conveyance to the city from the defendant.

On July 10, 1914, a resolution was introduced in the common council to revoke and withdraw the permission granted to the defendant in October, 1891 (*supra*), for the use of the fifty-one feet on Dickinson street.

Further action was taken by the common council with reference to such matter, but on April 14, 1915, the above cited resolution and recommendation of July 10, 1914, was voted down.

On November 28, 1919, by resolution, the common council of the plaintiff revoked and rescinded the permission given on November 13, 1891 (*supra*), for the occupation of the fifty-one feet in question and further directed and ordered that the defendant remove any and all buildings, workshops, and additions to its manufacturing plant theretofore placed by said defendant within the limits of North Dickinson street aforesaid so that the said North Dickinson street may

be open for public use to the full width of sixty-six feet between East Washington avenue and East Mifflin street.

The defendant refusing to comply with said resolution, this action was brought by the plaintiff praying judgment that the defendant do forthwith remove its buildings and structures from such portion of North Dickinson street and be forever enjoined and restrained from encroaching on the same. The defendant answered, among other things asserting its reliance upon and pleading certain statutes of limitation.

After trial the court made its findings of fact and conclusions of law and directed the entry of judgment in accordance with the prayer of the complaint. From such judgment the defendant has appealed.

For the appellant there were briefs by *Bagley & Reed* and *Olin, Butler, Thomas, Stebbins & Stroud,* all of Madison, and oral argument by *Harry L. Butler* and *William R. Bagley.*

William Ryan, city attorney, for the respondent.

ESCHWEILER, J. The defendant pleaded and relied upon as a bar to plaintiff's right to bring this action that which was at the time of the commencement and trial of this action sec. 926—125*q*, Stats., the parts whereof so far as material here reading as follows:

"No action shall hereafter be brought or maintained to annul or set aside any final order of any circuit court, or action of the common council of any city, heretofore made or taken for the vacation of any . . . plat, street, . . . or any part thereof, unless such action be pending or be commenced within six months from the passage and publication of this act; and at the end of such six months such attempted vacations shall be hereby validated except as they may be invalidated by actions then pending. . . ."

This statute is plainly one of limitation and of repose and requires a fair and reasonable construction (*Fish v. Collins,*

164 Wis. 457, 461, 160 N. W. 163) to carry out its manifest purpose of putting a quietus, after the period fixed therein, upon subsequent attempts by any form of action to upset or overturn proceedings theretofore had or attempted to be had with regard to the vacating of streets and highways. Such a statute is clearly within the legislative province to enact, for it is with reference to a subject matter, the public highways of the state, over which the legislature has the primary power as to the laying out and vacating thereof. *Chicago & N. W. R. Co. v. Railroad Comm.* 167 Wis. 185, 191, 167 N. W. 266; *Krueger v. Wis. Tel. Co.* 106 Wis. 96, 104, 81 N. W. 1041; 37 Cyc. 45; 13 Ruling Case Law, 163. It is a power which, though it may delegate to some appropriate administrative body, nevertheless is still the exercise of such power by the state itself. *Chicago & N. W. R. Co. v. Railroad Comm.* 167 Wis. 185, 192, 167 N. W. 266; *Warden v. Hart,* 162 Wis. 495, 497, 156 N. W. 466.

Having the primary power to prescribe the regulations for the surrender of the public easement in and to that which theretofore had been enjoyed by the public as a public highway by prescribed vacation proceedings, the legislature may, by subsequent legislation, ratify that which was attempted to be done or imperfectly done at some prior time. *State ex rel. Ervin v. County Board,* 163 Wis. 577, 581, 158 N. W. 338; 37 Cyc. 131.

Construing this statute as an entirety, as it is proper we should (*State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 169 Wis. 183, 190, 172 N. W. 230), it must be held to be a complete bar to the plaintiff obtaining the relief sought in this action.

Although neither the complaint nor judgment in this action makes mention of the various proceedings with reference to this particular strip of land fifty-one feet in North Dickinson street which were had and done by the respective parties in 1903 and 1904 and which are recited in the fore-

going statement of facts, nevertheless the effect of the judgment below, if affirmed here, is a virtual and effective setting aside and holding for naught all that was so done. The silence in that regard in both the complaint and the judgment does not alter the substance and effect of the judgment or make this any the less an action to annul or set aside the prior action of the common council made or taken for the vacation of the part of the street involved.

We deem it unnecessary to determine, and therefore express no opinion, as to whether the judgment of the circuit court of April, 1904, in form vacating the strip of land in question, was void because exceeding the jurisdiction of such circuit court, as is contended for by plaintiff here in reliance upon the case of *Petition of Hayes,* 139 Wis. 163, 120 N. W. 834, because the application of the above quoted statute to the facts here presented is not dependent on such judgment.

When the common council, acting upon a subject matter over which it had unquestioned jurisdiction, namely, the vacating of the strip of street here involved, by formal resolution extended and widened Water street over and upon the land then conveyed to it by defendant, and by further formal resolution accepted the said conveyance so reciting the consideration and without reservation or limitation, and all after the judgment in the action then brought and to which the plaintiff was a party, all these proceedings being had in good faith by the parties concerned and evidently being considered all that was necessary to effect the vacation of the fifty-one feet on Dickinson street, there was either a valid, effectual vacation thereof or an attempted vacation. If valid, it is binding on the city by its own force; if but an attempt, it becomes binding by force of the legislative decree embodied in sec. 926—125*q*, Stats., *supra*. The power thus exercised by the legislature is independent and paramount, and the time having elapsed within which

there was opportunity for repentance or repair, the attempted vacation has become absolute.

This makes it unnecessary to consider or pass upon any of the other questions presented, and it follows that the judgment of the circuit court must be reversed and the action dismissed.

By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the complaint.

HAFFNER and wife, Plaintiffs in error, vs. THE STATE, Defendant in error.

February 11—March 14, 1922.

Keeping house of ill fame: Evidence: Sufficiency: Question for jury: Presumption: Coercion of wife by husband: Comment by counsel upon defendant's failure to testify: Discretion of court as to argument: Proof of sale of liquor in house: Knowledge of defendant: Necessity of actual knowledge: Circumstantial evidence: Harmless error.

1. In a prosecution of husband and wife for keeping a house of ill fame, the evidence is *held* sufficient to authorize the submission to the jury of the issues as to whether the wife was one of the keepers of the house or participated actively in its management and had knowledge of the unlawful use of the premises.
2. The presumption that what a wife does in her husband's presence she does because of his coercion is inapplicable in such a prosecution.
3. The question whether defendants received money paid a waiter by visitors for the use of rooms is for the jury.
4. Statements of the district attorney that there were some things that half the members of the firm might have explained but did not, and that the husband testified as to what he knew but that he could not tell what somebody else knew, were improper, and, if unexcused, were in violation of sec. 4071, Stats., providing that defendant's refusal or omission to testify shall create no presumption against him, though defend-

ant did not call his bartender to testify, as the jury may have believed that the remarks referred in part to the defendant wife.

5. Where it is fairly inferable from the statements of counsel for the state, to which objection was made as commenting on defendant's failure to testify, that defendants' counsel had discussed the nonproduction of witnesses by the state, it will not be presumed that the trial court, whose discretion in such matters is wide, erred in permitting such statements, though the record did not disclose what statements had been made by defendants' counsel.
6. Where there was ample proof of immoral practices in defendants' house, proof of the sale of liquor to visitors was admissible and not prejudicial, such sale not being an independent offense disconnected with the offense charged.
7. One cannot be convicted of keeping a house of ill fame under sec. 4589, Stats., without knowledge of the unlawful conduct of visitors, but such knowledge may be proved by circumstantial evidence.
8. A conviction of keeping a house of ill fame, where the evidence as to immoral acts by frequenters was clear, and the circumstantial evidence as to the knowledge of the defendants of these acts was such that the jury could hardly have avoided finding such knowledge, will not be reversed because of an erroneous instruction that to convict it was sufficient if the keeper of the house, as a person of ordinary prudence and caution, ought to have known that the house was being used for unlawful purposes, as this court, after an examination of the entire proceeding under sec. 3072*m*, is convinced that defendants' substantial rights were not prejudiced.

ERROR to review a judgment of the municipal court of Milwaukee county: MARTIN L. LUECK, Acting Judge. *Affirmed.*

The plaintiffs in error, hereinafter called the defendants, were found guilty of the charge of "keeping a house of ill fame" under sec. 4589, Stats., and sentenced to serve two years in the house of correction of Milwaukee county.

The house in question is situated just outside the limits of the city of Milwaukee. The premises consist of a dwelling house, in the front of which, to the east, is a dance hall; and in the rear of this dance hall are two small rooms, a

toilet and kitchen. There is free access from the dance hall into these two small private rooms, the place where the acts on which the information is based are alleged to have taken place. The furnishings of each of these two rooms consist of two chairs, a table, lamp, and carpet. The upper story of the house is used as living quarters by the defendants.

The state produced several women who testified that their business was prostitution; that they had on various occasions, with different men, come to the Rock Top Inn; that the place was also known as "Diamond Minnie's;" that they had been served with whisky; that they had seen defendant *Mary Haffner* and had talked with her; that the waiter, upon receipt of a dollar, had ushered them into one of the private rooms; that they had used these rooms for immoral purposes; and that they had come to the Rock Top Inn because it was known as a place where such practices were carried on.

Other witnesses for the state testified that the place was popularly known as "Diamond Minnie's;" that the front and back doors were always kept locked; and it was proved that defendant *John Haffner,* some time before, had been convicted of a similar offense.

Defendants testified that the place was a road-house, specializing in the serving of chicken dinners; that it was frequented by people of good reputation; that *Mary Haffner* had charge of the kitchen only; that neither the house as a whole, nor the rooms in particular, were fitted for the purpose charged in the information; that they had never seen any lewd actions there; and that if the rooms were used for immoral practices, the acts were done without their knowledge. Other facts are stated in the opinion.

For the plaintiffs in error there was a brief signed by *W. B. Rubin* of Milwaukee, of counsel, and oral argument by *Mr. Rubin.*

For the defendant in error there was a brief by the *At-*

torney General, Winfred C. Zabel, district attorney of Milwaukee county, and *George A. Shaughnessy* and *Eugene Wengert,* assistant district attorneys, and oral argument by *Mr. Zabel* and *Mr. Shaughnessy.*

JONES, J. On this appeal counsel for defendants ask that the case be reversed with direction to dismiss the complaint as to defendant *Mary Haffner* and to grant a new trial as to defendant *John Haffner.*

Sec. 4589, Stats., reads in part as follows:

"Any person who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, or who shall set up or keep a common bawdyhouse or brothel, or who shall set up, maintain or operate any place, structure, building or conveyance for the purpose of prostitution, lewdness or assignation, or who shall knowingly lease or let to another any place, conveyance, structure, house or other building or any room in any house or building for the purpose of being used as a house of ill fame, bawdyhouse or brothel or for purposes of prostitution, lewdness or assignation or knowing that it will be so used, or who shall receive, or offer or agree to receive any person into any place, structure, building or conveyance for the purpose of prostitution, lewdness or assignation, or shall permit any person to remain there for such purpose, shall be punished . . ."

The errors assigned are (1) the refusal of the trial court to discharge defendant *John Haffner* at the end of the state's case for want of evidence to submit the case to the jury; (2) the refusal to direct a verdict of "Not guilty" in favor of the same defendant at the end of all the testimony; (3 and 4) the refusal to make the same orders with respect to defendant *Mary Haffner;* (5) the refusal to grant a new trial because the verdict was contrary to the evidence; (6) the overruling of objections to certain remarks to the jury by the district attorney; (7) the admission of evidence relative to the serving of whisky; (8 and 9) the refusal to give requested instructions and the giving of improper ones.

The first two assignments of error present little difficulty, since counsel for defendants did not seriously contend that there was not sufficient evidence as to the guilt of *John Haffner* to take the case to the jury, and since a new trial only is asked as to him.

As to the third, fourth, and fifth, there was testimony by M—— to the effect that she had used one of the rooms for immoral purposes on twelve different occasions, each time with a different man; that she had seen defendants in the dance hall; and that she came to this place because she knew it could be used for the purposes mentioned. F—— testified that she had come to the place on five different occasions with different men; that she had used the rooms for immoral purposes each time; and that she had seen and talked with defendant *Mary Haffner* in the dance hall. K—— testified that she had been to the house twice; that she had never used the rooms, but that her escort and another girl had; that she had seen and talked with defendant *Mary Haffner* in the dance hall; that previous to the trial this defendant had seen her in Milwaukee, had asked her if she was being held as a witness, and had offered to call on her and assist her. G—— and F——testified that they had used the rooms; that they had been served with drinks; and had seen defendant *Mary Haffner* in the dance hall. E——, witness for the defense, testified that she was a pianist; that she had often played at the Rock Top Inn; that both *Mr.* and *Mrs. Haffner* had charge of the place; and that on some occasions *Mrs. Haffner* was present in the dance hall until five o'clock in the morning. Other witnesses testified that the place was run by *Mr.* and *Mrs. Haffner;* that it was popularly known as "Diamond Minnie's;" and that the front and back doors were always locked.

It may be conceded that the burden was upon the state to prove beyond a reasonable doubt that *Mary Haffner* was one of the keepers of the house or had active participation in its management and control, and also that knowledge of

the unlawful use of the premises is essential under the statute.

In determining these questions the jury had the right to consider the mass of evidence which was received and to draw such inferences as reasonable men under all the circumstances would naturally draw. It was not without significance that the house was known as "Diamond Minnie's" and bore the reputation of being a house of ill fame. The fact that the place bore this reputation was not alone proof of guilt, but was a fact proper to be considered. There was testimony of several witnesses that both defendants were in charge of the premises. The jury were not bound by the assertions of the defendants that they were ignorant of all the shameless immorality which was proved. The jury probably believed from the testimony already detailed that *Mary Haffner* was as likely to know what was transpiring between men and women of bad reputation under the family roof as her husband, and we cannot say that such belief was not justified.

Defendants' counsel rely in part on the presumption that what a wife does in her husband's presence she does because of his coercion. We are not unmindful of this presumption. Blackstone said in his Commentaries, the "doctrine is at least a thousand years old in this kingdom, being found among the laws of King Ina, the West Saxon. And it appears that among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offense with a freeman; the male or freeman only was punished, the female or slave dismissed." 4 Blackstone, 28. But at an early date exceptions were engrafted upon this presumption, and one of the exceptions was that it did not apply to keeping a house of ill fame. In 1 Hawkins, Pleas of the Crown (8th ed.) p. 5, it is said: "Also a wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy-house;

for this is an offense as to the government of the house, in which the wife has a principal share; and also such an offense as may generally be presumed to be managed by the intrigues of her sex." *King v. Dixon,* 10 Mod. Rep. 335 (5th ed.). This exception has frequently been declared by the courts of this country. 18 Corp. Jur. 1252, 1262; *State v. Jones,* 53 W. Va. 613, 45 S. E. 916; *People v. Wheeler,* 142 Mich. 212, 105 N. W. 607; *State v. Gill,* 150 Iowa, 210, 129 N. W. 821; *State v. Keithley,* 142 Mo. App. 417, 127 S. W. 406. In other offenses the presumption of the wife's coercion was easily rebuttable at common law. After the enactment of statutes looking to the wife's complete emancipation and equality with her husband before the law, the ancient presumption may not be entirely scrapped, but it certainly will not be strengthened.

Error is assigned because of remarks during the argument of the district attorney which are claimed to be prejudicial. One of the arguments was that defendants received the money paid the waiter by those using the rooms. This was objected to as not based on any evidence. The court held, and we think properly, that under all the circumstances this was for the jury to determine.

Other objections were to the following statements by the district attorney:

"They talk about us not producing witnesses. There are some *things that half of the members of this firm might have explained but did not. John* took the stand as to what he knew—*he can't tell you as to what somebody else knows —he can only speak for himself.*" "So you see they talk to you about the state not producing witnesses, they forget that they have failed very signally in respect to producing witnesses that might have proven a great many things. We cannot evade—"

These statements were improper unless explained or excused by other proceedings at the trial. If without excuse they were in violation of sec. 4071, providing that in criminal cases the refusal or omission of a defendant to

testify shall create no presumption against him or any other party to the action. The defendant had not called as a witness the bartender who had conducted the visitors of the house to the private rooms and received the money from them. It is argued by counsel for the state that the remarks above quoted referred to this bartender and not to *Mary Haffner.* We consider, however, that they may have referred in part to her and that the jury may have so believed. The excuse chiefly relied on by the state is that the statements were responsive and a proper reply to other arguments made by defendants' counsel. It may be fairly inferred from the opening sentence in the statements objected to that counsel for defendants had been discussing the nonproduction of a witness or witnesses by the state, and it is asserted in the brief of counsel for the state that this was the fact. The record does not disclose what statements had been made by the district attorney. The trial judge had heard them and evidently believed that since the door to such discussion had been opened by the counsel for defendants the reply was justified. In such matters the trial court has a wide discretion, and error is not to be presumed. *Hoffmann v. State,* 65 Wis. 46, 26 N. W. 110; *Baker v. State,* 69 Wis. 32, 33 N. W. 52.

Another assignment of error is that evidence was received of the sale of intoxicating liquor on the premises to those using the private rooms.

Defendants' counsel rely on the familar general rule that on a criminal charge other independent offenses cannot be proven. Counsel cite numerous cases relating to offenses for keeping disorderly houses, but none of them supports the contention now raised that proof may not be given of the sale of liquor to visitors while they are frequenting a house of ill fame. The only case cited in either brief which is directly in point is *State v. Guyer,* 91 Vt. 290, 100 Atl. 113, which held that such testimony in connection with other evidence tended to show the character of the house. The

wide range of testimony which may be received in a prosecution for keeping a house of ill fame is illustrated by cases cited in Underhill on Criminal Evidence (2d ed.) § 482. Where there is ample proof of such immoral practices as were carried on in defendants' home, we cannot hold that the sale of liquor was an independent offense disconnected with the offense charged or that proof of it was prejudicial.

The most serious question in the case, and one which has been very ably argued by counsel for both parties, arises out of the giving of the following instruction:

"The offense with which the defendants are charged consists in keeping a house of ill fame resorted to for purposes of prostitution and lewdness. To render the keeper of a house guilty of the offense he must have knowledge of the unlawful purposes of those who resort to it, and must consent to its use for this purpose; *but the knowledge mentioned need not be that actual and positive knowledge which is acquired by personal observation of acts of lewdness; it is sufficient if under all the circumstances established the keeper of the house as a person of ordinary prudence and caution* OUGHT TO HAVE KNOWN *that the house was being used for purposes of prostitution.*"

The court gave the usual and proper instruction as to burden of proof and reasonable doubt. It is argued by defendants' counsel that the last part of the instruction quoted practically informed the jury that they could convict defendants for mere negligence, and they rely on *Meath v. State,* 174 Wis. 80, 182 N. W. 334, and *State v. Mausert,* 85 N. J. Law, 498, 89 Atl. 1011, as authority for a reversal. In some respects these cases are distinguishable from the one before us. In the *Meath Case* the defendant was convicted under sec. 4417, Stats., relating to receiving stolen goods, and the statute expressly makes knowledge an ingredient of the offense. The offense consisted of a single transaction, not of a series of acts. The principal evidence was that of the thief, and knowledge by the defendant was the very gist of the action. In the New Jersey case above

cited the jury were in effect told that negligence, irrespective of knowledge, would suffice to convict, and the charge was held erroneous.

Although these cases are dissimilar to the one before us, they do hold that in criminal cases of the kind then under consideration it is necessary to prove something more than that the defendants ought to have knowledge of the acts complained of, and this is the general rule. The proprietor of a house cannot shut his eyes to acts and conduct which clearly show that his place is being used for purposes of prostitution. But it would be a dangerous rule that the proprietor of a hotel or boarding house could be convicted of the crime of keeping a house of ill fame without knowledge of the conduct of the wrongdoers. Such a rule would make it necessary to investigate the antecedents of his guests in such a manner as would be wholly impracticable. Although the knowledge must be shown, it may be proven by circumstantial evidence, and indeed in most cases must generally be so proven; and those circumstances may be so convincing that the knowledge of the persons in control may be found by the jury despite the most positive denials.

It is argued by counsel for the state that the cases which hold that in liquor prosecutions knowledge on the part of defendants of the wrongful acts is not necessary should control this case, and such cases as *Olson v. State,* 143 Wis. 413, 127 N. W. 975, and *Reismier v. State,* 148 Wis. 593, 135 N. W. 153, are cited. But such prosecutions are under statutes which impose penalties irrespective of motive or intent, and we do not regard them as analogous.

We are therefore compelled to hold that the instruction complained of was erroneous. The only remaining question is whether giving it was prejudicial within the meaning of the statute, sec. 3072*m*. This case is distinguished from many others of its class by the fact that it was proven by direct and undisputed evidence that prostitution of the most disgraceful kind was being carried on in the premises which

defendants controlled. The circumstantial evidence which tended to bring knowledge to the defendants need not be restated or further discussed. It was of such a character that in our opinion the jury could have hardly avoided coming to the conclusion that defendants had knowledge of the purposes for which the house was being used. The section above cited forbids us to reverse or set aside the judgment or grant a new trial in this case on the ground of misdirection of the jury unless in our opinion, after examining the entire proceeding, it appears that the error complained of has affected the substantial rights of the defendant.

We are convinced after such examination that the substantial rights of the parties were not affected by the error in the charge. On the contrary, we believe that the result would have been the same if the correct instruction had been given. Since we find no prejudicial error, it becomes our duty to affirm the judgment. *Hack v. State,* 141 Wis. 346, 124 N. W. 492; *Oborn v. State,* 143 Wis. 249, 126 N. W. 737; *Radej v. State,* 152 Wis. 503, 140 N. W. 21.

By the Court.—Judgment affirmed.

FINSKY, Plaintiff in error, vs. THE STATE, Defendant in error.

February 11—March 14, 1922.

Intoxicating liquors: Dealers in nonintoxicating beverages: Unlawful liquor upon premises: Title: Use in evidence: Information: Stating crime in words of statute: Judicial notice: Acts of Congress: Search of dealer's premises: Warrant: Permission: Instructions: Harmless error.

1. An indictment is sufficient which states the crime in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense charged really is.

2. Under sec. 1569—8, Stats. 1919, providing that no person shall have in his possession or under his control in the building in which he conducts his business of selling or dispensing nonintoxicating beverages any intoxicating liquor, an information charging the offense substantially in the language of the statute was sufficient within sub. (4), sec. 4658, requiring the offense to be set forth with such degree of certainty that the court may pronounce judgment, as the statute sufficiently individuates the offense.
3. Though sec. 1569—3, Stats. 1919, after defining intoxicating liquor, provides that, if Congress shall by a valid act define such words, such definition shall be adopted, an information charging defendant with having intoxicating liquors as defined by such section in his possession and under his control, in violation of sec. 1569—8, need not specifically allege that Congress by a valid act has defined the words "intoxicating liquor" as used in the Eighteenth amendment to the federal constitution, as the court takes judicial notice of the constitution and statutes of the United States.
4. Under said sec. 1569—8, giving the prohibition commissioner or his deputies the right of access at all reasonable hours to premises occupied by any retail dealer in nonintoxicating beverages, search could be made without warrant or without license of the dealer, and liquor found by a deputy prohibition commissioner concealed on the premises of such a dealer was detected and seized by him pursuant to legal authority, which the legislature, under the police power, could delegate.
5. Under sec. 1569—13, Stats., providing for the forfeiture of liquors kept by dealers in nonintoxicating beverages in the building where such business is conducted, such liquor when seized became the property of the state, which thereby became vested with the right of property and possession thereof, and the liquor could be offered in evidence in a prosecution against the dealer.
6. An instruction that the law presumed defendant to be innocent and that the "doubt" remained in his favor throughout the trial until removed by evidence which convinced the jury of his guilt beyond all reasonable doubt, was erroneous; but from an examination of the whole proceeding under sec. 3072*m*, Stats., this court is convinced that the error was not prejudicial.

ERROR to review a judgment of the county court of Walworth county: ALDRO JENKS, Acting Judge. *Affirmed.*

The defendant was charged in the information of the

district attorney, before the county court of Walworth county, with having in his possession and under his control on the 30th day of March, 1921, in a building occupied by him and situated in the city of Lake Geneva, Walworth county, Wisconsin, in which building he conducted his retail business of selling nonintoxicating beverages, also intoxicating liquors, as defined by sec. 1569—3 of the Statutes, contrary to the provisions of sec. 1569—8 of the Statutes. The action was tried before a jury and the defendant was found guilty, whereupon the court sentenced him to serve a term in the county jail and to pay a fine, etc. The cause is now before this court on a writ of error sued out by the defendant.

For the plaintiff in error there was a brief by *Charles S. French* and *H. A. Burdick,* attorneys, both of Lake Geneva, and *Jerome J. Foley* of Racine, of counsel, and oral argument by *Mr. Foley.*

For the defendant in error there was a brief by the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general, and oral argument by *Mr. Messerschmidt* and *Mr. Easton Johnson,* district attorney of Walworth county.

DOERFLER, J. When the information was filed in the county court the defendant made and filed a motion to quash the same for the reason that it did not sufficiently charge him with the commission of an offense under the laws of the state of Wisconsin. The refusal of the court to grant defendant's motion constitutes his first assignment of error.

The information is as follows:

"I, Easton Johnson, district attorney for Walworth county, Wisconsin, hereby inform the court: That *Joseph Finsky* did, on the 30th day of March, A. D. 1921, at said county and state aforesaid, in the city of Lake Geneva, keep and have in his possession for retail sale, nonintoxicating beverages as defined in sec. 1569—3 of the Wisconsin Statutes, and that the said *Joseph Finsky* did then and there have in his possession and under his control, in the building

occupied by him, situated in the city of Lake Geneva, Walworth county, Wisconsin, in which building he conducts his business of retail and having for sale nonintoxicating beverages, also intoxicating liquors as defined in said sec. 1569—3, and contrary to the provisions in sec. 1569—8 of the Wisconsin Statutes, against the peace and dignity of the state of Wisconsin."

Sec. 1569—8, Stats., provides:

"No person who shall keep or have in possession for retail sale nonintoxicating beverages as defined in section 1569—3 hereof shall at any time have in his possession or under his control in the building in which he conducts his business or selling or dispensing any such beverages, any intoxicating liquor as defined in said section. The prohibition commissioner or his deputies shall have the right of access at all reasonable hours, without notice, to the premises occupied by any such retail dealer in nonintoxicating beverages, to investigate if this provision is being violated."

Sec. 1569—3, Stats., is as follows:

"Intoxicating liquor, within the purview of said constitutional amendment and the provisions of this act, shall be construed to be and include all liquors and drinks of whatsoever name or description, including patent or proprietary medicines, capable of being used as a beverage, containing more than two and one-half per centum of alcohol by weight at sixty degrees Fahrenheit. But if the Congress of the United States shall hereafter by a valid act which shall become the law of the land and be paramount to any state laws on the subject, define the words 'intoxicating liquors' as used in article 18 of the constitution of the United States, then such definition, from the time such act of Congress becomes operative, shall be the definition thereof under this subdivision."

Sec. 4658, Stats., provides:

"The information shall be sufficient if it can be understood therefrom: . . .

"(4) That the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case."

The information as above set forth charges the commission of the alleged offense substantially in the language of the statute. It is sufficient to frame the indictment in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be held for really is. Wharton, Crim. Pl. & Pr. (8th ed.) § 220; *Steuer v. State,* 59 Wis. 472, 475, 18 N. W. 433.

The offense charged, in plain language, consists of the offender having in his possession, at his place of business where he is licensed to sell nonintoxicating beverages, prohibited intoxicating beverages. It would therefore appear clearly that the statute creating the offense individuates the same to such an extent that the offender, in the use of the statutory terms contained in the information, can readily determine what the offense really is with which he is charged. In fact, if the language of this statute does not individuate the offense sufficiently, then it is difficult to conceive of language of a statute which does so. It follows, therefore, that if the language used in the information is sufficiently certain to convey to the defendant proper notice of the offense with which he is charged, then the offense charged is set forth with such degree of certainty that the court may pronounce judgment upon a conviction according to the right of the case, as required by sub. (4), sec. 4658, Stats., above quoted.

It is also claimed by defendant's counsel that the information is defective in that it does not specifically allege that Congress by a valid act defined the words "intoxicating liquors" as used in art. XVIII of the constitution of the United States.

The information specifically charges the defendant with having had in his possession and under his control, etc., intoxicating liquors, and expressly refers to the section of the statute which defines intoxicating liquors. The court

takes judicial notice not only of the constitution and statutes of this state, but also of the constitution and statutes of the United States, and therefore such reference to the statutes not only fully apprises the court with a sufficient degree of certainty of the offense with which the defendant is charged, so as to enable it to pronounce judgment upon a conviction, but also brings home similar notice and information to the defendant.

It has been held in relation to statutory offenses that the usual and safer practice in drawing informations and indictments is to pursue the language of the statute, because it is not likely that more apt and appropriate expressions can be employed to convey the meaning of the legislature than the words which the legislature itself employed for that purpose. 10 Ency. Pl. & Pr. 486, and cases cited.

It has been held by this court that an indictment for obtaining goods under false pretenses must set out the pretenses used as well as the other facts which constitute the offense. *State v. Green,* 7 Wis. 676; *State v. Crowley,* 41 Wis. 271, 276.

It was also held in *Steuer v. State,* 59 Wis. 472, 476, 18 N. W. 433, in referring to a complaint charging abusive and obscene spoken words, that it is necessary, in order to make a good complaint, to set forth the abusive and obscene words which constitute the offense, otherwise it does not appear on the face of the complaint that any offense has been committed. The mere charge that a person has obtained goods under false pretenses, or that he has been guilty of the offense of libel, or that he has been guilty of using obscene and abusive language tending to provoke a breach of the peace, does not give the court sufficient information as to whether or not an offense has in fact and in law been committed.

The offense as charged in the information in the instant case differs materially from the offense charged generally in an action of libel or in a complaint charging abusive and

obscene language, and of false pretenses, in that the wording of the statute individuates the offense so that it can be determined from the face of the information what the precise offense is with which the defendant is charged, thus bringing home to both the court and the defendant the necessary notice required by law.

After the impaneling of the jury and before the introduction of any evidence, the defendant by motion demanded the return of the goods seized by the officers and the suppression of any evidence with respect to any of the illicit goods seized, on the ground that the seizure of such goods was made under a void search warrant. The refusal of the court to comply with this motion constitutes defendant's second assignment of error.

The record reveals beyond contradiction that on March 13, 1921, one Bloodgood, a deputy prohibition commissioner, together with one White, the sheriff of the county, and several deputy sheriffs, entered in and upon the premises of the defendant, referred to in the information, said sheriff having in his possession an alleged search warrant. The deputy prohibition commissioner in making a search of the premises found behind the bar, in a waste basket, a bottle of liquor containing, as testified to by one Keebler, assistant chemist of the Wisconsin dairy and food commission, 44.64 per cent. of alcohol by volume. There is also credible testimony that when the deputy prohibition commissioner made the search which resulted in finding the liquor aforesaid, the defendant not only consented to the investigation of the premises but expressly invited the same.

We will not consider in the opinion in this case the sufficiency or the validity of the search warrant referred to, as we deem it unnecessary, under the circumstances, to go into the matter. Independent of the actual consent given by the defendant, we are convinced that the prohibition commissioner and his deputies had full authority in law at all times to make an investigation of these premises. The busi-

ness of selling nonintoxicating liquors is conducted under license, and the palpable object which the legislature had in mind in enacting sec. 1569—8, *supra,* which authorizes an investigation of the premises of the licensee by the prohibition officer and his deputies, was to afford ample opportunity to ascertain whether the licensee in any respect violates the terms and conditions under which his license was granted, and particularly to afford an opportunity to determine whether, under the guise of a license, prohibited intoxicating liquors are being sold. Without the latter provision of the statute the object and purpose of the liquor laws would be emasculated and frustrated. This liquor was therefore detected and seized by the prohibition officer pursuant to legal authority granted by the legislature. Such authority so delegated is pursuant to the police power of the state, and by numerous statutes in this state similar power of investigation has been extended to state officials for the purposes of law enforcement.

Sec. 1569—13, Stats., provides:

"All such liquors kept by retail dealers in nonintoxicating beverages as defined in said section and on hand in the building where such business is conducted at the time this act becomes operative, or at any time subsequent thereto, shall be deemed contraband and subject to seizure by the prohibition commissioner."

The liquor, under the statute last referred to, was contraband, and in contemplation of law, when the defendant came into possession of the same, was at all times liable not only to seizure but to forfeiture, and immediately became the property of the state, and the state was vested with the right of property and possession thereof. *U. S. v. Fenton,* 268 Fed. 221, 222. See, also, *U. S. v. Stowell,* 133 U. S. 1, 16, 10 Sup. Ct. 244, 33 Lawy. Ed. 555. Having forfeited both ownership and right of possession, and the title of such liquor in contemplation of law being in the state, and the

seizure thereof being lawful, the article seized can be introduced in evidence in the case against the defendant.

Counsel for defendant assigns as error the giving of the following instruction to the jury:

"The law presumes the defendant to be innocent and that doubt remains in his favor throughout the trial until it is removed by evidence which convinces the jury beyond all reasonable doubt that he is guilty."

The court evidently used the word "doubt" in its instructions instead of the word "presumption." This instruction is clearly error; but can it be said that it constitutes prejudicial error in the sense that it has affected the substantial rights of the defendant as provided by sec. 3072*m*, Stats.? From the facts herein disclosed and from an examination of the record in the entire action, it is our opinion that such error does not constitute prejudicial error. The possession of the liquor and its alcoholic contents as disclosed by the chemist are uncontradicted. The guilt of the defendant was therefore clear, and the jury in any event could not conscientiously render a verdict otherwise than that of guilty. If the instant case involved a close question of fact, sharply contested, and it appeared from the record that reasonable men might come to different results after listening to the evidence, a different situation would be presented, and it would then become incumbent upon us to hold the error prejudicial, and to reverse the judgment and sentence of the lower court and order a new trial.

Other objections have been urged to the instructions, but suffice it to say that we have examined the instructions of the court carefully and we find no prejudicial error in the same.

The judgment and sentence of the lower court is therefore affirmed.

By the Court.—It is so ordered.

MULKERN, Plaintiff in error, vs. THE STATE, Defendant in error.

February 11—March 14, 1922.

Automobiles: Criminal law: Speeding: Evidence: Statutes: Definiteness in charging crime.

1. Evidence showing that defendant drove a heavy car along a street having a steep down grade and a slight curve, and which had been recently oiled, at a speed of twenty to twenty-five miles per hour, is *held* to sustain a conviction under sec. 1636—49, Stats., for driving an automobile at a rate of speed greater than was reasonable and proper.
2. Sec. 1636—49, Stats., making it an offense to drive a motor vehicle "at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highways and the general and usual rules of the road, or so as to endanger the property, life or limb of any person," is sufficiently definite and certain to be valid, though different juries might differ as to what was a reasonable speed under the same circumstances.

ERROR to review a judgment of the municipal court for the Eastern District of Waukesha County: JAMES E. THOMAS, Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, was charged with violating that portion of sec. 1636—49, Stats. 1919, which reads: "No person shall operate or drive any automobile, motorcycle or other similar motor vehicle recklessly or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highways and the general and usual rules of the road, or so as to endanger the property, life or limb of any person," and was found guilty. To test the correctness of the conviction he sued out a writ of error.

The cause was submitted for the plaintiff in error on the brief of *Ray Cannon* of Milwaukee, and for the defendant in error on that of the *Attorney General* and *J. E. Messerschmidt,* assistant attorney general.

VINJE, C. J. Defendant claims (1) that the conviction was contrary to the evidence, and (2) that the statute is too vague and uncertain to sustain a conviction, in that it does not define any offense with sufficient certainty to enable a jury to determine whether or not there has been a violation of the statute or to enable the driver of a car to tell when he violates it.

An examination of the evidence shows that the defendant was driving a heavy Packard car down a steep hill on a slight curve at a speed of about from twenty to twenty-five miles an hour; that the complainant was ahead of him driving a small car at a somewhat slower speed; that just as he had partly turned out to pass complainant he noticed another car coming in the opposite direction, so he used both brakes at once to slow up. In doing so his car slewed around and skidded into complainant's car. The road had been freshly oiled and was slippery and the hind end of defendant's car struck the end of complainant's car, which ran down the road several hundred feet, then up a three-foot embankment against a stone. It was in high gear till it struck the stone, when complainant turned it into neutral. Defendant's car turned over in the ditch. Defendant knew the road was oiled and slippery and he drove down the hill with the right wheels of his car on the gravel outside the oiled part. He also knew that in order to pass complainant he must turn onto the oiled road and that, too, at a curve. In view of this fact we deem there was a warrant for the conclusion of the trial court that defendant was driving his car at a speed in excess of that contemplated by the statute. A steep down grade, a curve therein, and an oiled road all spell care and a slow speed. The tendency of a car to skid under such circumstances is well known and the speed should be such as to reduce that tendency to one as much within the margin of safety as possible. A speed of from twenty to twenty-five miles an hour under such circumstances may well be found to be reckless. *Raymond v. Sauk Co.* 167 Wis. 125, 166 N. W. 29.

It is claimed that the statute under which defendant was convicted was too vague and uncertain to sustain a conviction, in that it is impossible for the driver of a car to know whether or not he is violating it; that the fact of violation depends upon the judgment of a court or jury and not upon specific criteria contained in the act itself; that one jury may convict and another acquit upon the same state of facts. This is true, and defendant relied upon cases from Georgia in which a similar statute has been held void for uncertainty. See *Hayes v. State,* 11 Ga. App. 371, 75 S. E. 523; *Holland v. State,* 11 Ga. App. 769, 76 S. E. 104; and *Elsbery v. State,* 12 Ga. App. 86, 76 S. E. 779.

If the fact that one jury might decide a case one way and another jury a different way upon the same state of facts rendered laws void for uncertainty, then we would have to discard not only many rules of civil law but also many criminal laws. In nearly every criminal act an intent to commit it must be found in order to warrant a conviction. Not only may such intent be found upon circumstantial evidence, but the direct evidence may well give rise to a situation where one jury will find the intent and another fail to find it. So, too, in many cases where guilty knowledge is required to be found, as in receiving stolen goods or in running a house of ill fame, juries may come to different conclusions upon the same state of facts. Even in murder of the second degree the definition of the crime is no more specific and certain than is that of the offense in the statute under consideration. It provides that the killing of a human being without intent to kill, "when perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life," shall be murder in the second degree. What is an act imminently dangerous to others, and what evinces a depraved mind regardless of human life, is as much a matter of judgment as is such reckless driving as will, under the circumstances, endanger the property, life, or limb of any person. Thus by sec.

4363, Stats. 1921, the involuntary killing of a human being by the culpable negligence of another is made manslaughter in the fourth degree. Juries may well differ as to what constitutes culpable negligence, yet a conviction thereunder is valid. Likewise in the law of negligence what constitutes a lack of ordinary care is a matter of judgment, the result of which is often followed by consequences far graver than is a violation of the statute in question. It is of course desirable that laws should be made as specific as is compatible with the subject matter legislated upon. A speed of so many miles per hour is specific and meets the requirements of many situations, but not of all, even though the rate for country and city driving is made different, as it usually is. Many situations may arise both in the country and in the city where the statutory speed would be reckless driving. To meet these situations the statute in question was enacted. We regard it as a very wholesome and sensible statute; one that calls upon every driver of a motor vehicle to at all times exercise such care as will reasonably insure the safety of the life and property of others; one that will supply the defects in laws regulating speed at so many miles per hour. We have a similar statute as to manslaughter in the fourth degree under sec. 4363, which provides that every other killing of a human being by the act, procurement, or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared ". . . murder or manslaughter of some other degree, shall be deemed manslaughter in the fourth degree." It is a dragnet statute, one that defines by exclusion rather than by inclusion, to the end that no culpable killing of a human being shall go unpunished. So here we have a salutary statute requiring the exercise of reasonable care at all times in the operation of such dangerous machines as are the vehicles described in the statute. It covers situations not possible to cover by specific speed limits, and it is as definite and certain in its terms as the subject matter will permit. It is not as dras-

tic in its penalties as are many laws, no more definite in the description of offenses, that have for years been enforced as valid laws.

By the Court.—Judgment affirmed.

WILL OF SMITH.

December 14, 1921—April 11, 1922.

Wills: Construction: After-acquired real estate: Property in expectancy: Absolute gifts or life estates: Right to use principal: Appointment of trustee: Perpetuities: Estate substantially personal property: Conversion of real estate.

1. A will which, after making specific devises and bequests, contained a gift of the residue of the property of the testatrix, real, personal, or mixed, "in possession or expectancy," there being nothing in the will restricting the term "expectancy" to personal property, manifested an intention to dispose of after-acquired real estate within the provisions of sec. 2279, Stats.
2. Where the will gave the residuary estate to the children of the testatrix and provided that if any of the children died without issue or left no husband or wife his share should go to the surviving children; that if all should die without issue or husband or wife surviving the whole residue and remainder should go to third persons; and that if any child died before or after the death of testatrix leaving issue such issue should take the parent's share absolutely, the children of testatrix took only a life estate.
3. Directions in the will as to the disposition of the share of any deceased child always referring to such share and not to any remaining portion thereof, and there being no declaration that the children shall have any right to such share absolutely, the will is construed to show no intention to give the children as life tenants any right to consume for their own purposes any of the principal of their respective shares.
4. Under such a will the surviving husband or wife of any child dying without issue is entitled absolutely to the share of such deceased child, though there is no express provision to that effect.
5. Under the circumstances of this case it was the duty of the court to declare a trust created and appoint a trustee, though there was nothing in the will expressly indicating that the

testatrix intended to create a trust, or directing how it should be carried out, or providing for the conversion of real estate into personal property.

6. The will, construed as requiring the court to declare a trust created, does not violate sec. 2041, Stats., relative to successive life estates, where a substantial part of the property was personal property, since to effectually carry out the purpose of the testatrix the real estate should be converted into personalty and the entire estate administered as such, particularly where the great bulk of the estate was personal property and a considerable portion of the real estate was unimproved.

ROSENBERRY and OWEN, JJ., dissent.

APPEAL from a judgment of the county court of Milwaukee county: M. S. SHERIDAN, Judge. *Affirmed.*

November 22, 1908, Mary Eliot Smith made her will just prior to making a European trip. She was then the owner of certain real estate in the city of Appleton and of certain shares of bank stock and her personal effects. One of the pieces of real estate in Appleton was sold prior to her death.

In 1917 Mrs. Smith's father, Robert Eliot of Milwaukee, died intestate, leaving an estate of approximately $350,000, one half of which came to Mrs. Smith and comprised the great bulk of her estate at the time of her death. She died April 8, 1919, leaving surviving her husband, Franklin T. Smith, and three children, *Mary Eliot,* now Goodrich, *Robert Eliot,* and *August Ledyard Smith 3d.* The two sons were minors at the time of her death, but one has attained majority since.

Application was duly made for a construction of the will by the administrator with the will annexed. Upon such hearing a guardian *ad litem* was appointed for the unascertained remaindermen. The portions of the will deemed in anywise material for consideration on this appeal are as follows:

(1) Direction for the payment of debts, funeral expenses, and of last sickness.

(2) To the daughter the wearing apparel, jewelry, and personal ornaments with certain exceptions.

(3) A gift and bequest to the daughter and the two sons, share and share alike, of all her right, title, and interest in and to the three certain pieces of land in the city of Appleton, Wisconsin (the piece first described being sold prior to her death); also to them

(4) All her right, title, and interest in and to certain bank stock.

Then follow portions of the will directly involved on this appeal, to wit:

"And all the rest and residue of my property, real, personal or mixed, in possession or expectancy, I give, devise and bequeath to my daughter, *Mary Eliot Smith,* and my said sons *Robert Eliot Smith* and *Augustus Ledyard Smith,* share and share alike. And if either of my said children should, after my decease, die without issue living at the time of their death, or after my decease die leaving no husband or wife surviving, then and in such case his or her share shall go to the survivor of my said children; and if all of my said children should die after my decease leaving no issue living at the time of their death, or husband or wife surviving, then and in such case the whole residue and remainder of my estate shall go over and be disposed of in the manner specified in the next paragraph hereof. If either of my said children shall die before my decease, or after my decease, leaving issue, such issue shall take absolutely all the share which the parent of such issue had at the time of the death of such parent, or such share as the said parent would have had if he or she had survived me, as the case may be.

"In case that neither of my said children nor any issue of either of them survive me, or in case either or all of my children do survive me, but after my death and at the death of the last survivor of them there be no issue living of any of my said children or husband or wife of either of my said children surviving, as the case may be, then and in either of these two cases, I give, devise and bequeath to my father,

Robert Eliot [here follows a provision as to the Appleton real estate which was sold by testatrix]; . . . and I will and bequeath to my cousin Amy Cross, the aforesaid numbered shares of bank stock in the National Exchange Bank of Milwaukee, Wisconsin, and all the rest and residue of my property, real, personal and mixed, to my cousin, Dorothy Kershaw, her heirs, executors, administrators and assigns, but if she, the said Dorothy Kershaw, should die before my aunt, Mrs. Julia W. Emmons, and my cousin Mary Christie Emmons, then and in such case it is my will that all the rest and residue of my property, real, personal and mixed, shall go to the said Julia W. Emmons and Mary Christie Emmons, share and share alike, or to the survivor of them, as the case may be."

Recital as to the omission to make any provision for her husband.

Appointment of her husband as guardian of the children if they be minors at the time of her death.

The appointment of an executor.

Attached to the will is a writing in substance reciting knowledge of the execution of the will and waiver by the husband of any rights in and to her estate.

Some testimony was taken upon the hearing but it is not deemed material to set forth here.

The county court made findings of fact and conclusions of law, the material parts of which, other than those embodied in the foregoing statement of facts, were to the effect that the shares of bank stock mentioned in the will were of the value of about $13,000; that she died seized of improved real estate in the city of Milwaukee valued at about $45,000, of unimproved real estate in the state of Michigan worth about $22,100, and in the state of California of about $500 value; that the real estate in the city of Appleton of which she died seized was worth about $3,200, and that the balance of the estate consisted of personal property appraised at about $302,000.

As conclusions of law the court construed the will to provide substantially as follows:

1. The daughter to take the wearing apparel, jewelry, and personal ornaments absolutely.

2. The three children to take each an undivided one-third in fee simple of the Appleton real estate.

3. The three children to take absolutely, share and share alike, the bank stock.

4. That the bequests over of said bank stock were void for repugnancy.

(No question is raised here by exceptions or appeal to the foregoing four conclusions.)

5. That a trust is created for the rest and residue of the estate, both real and personal, after payment, etc.

6. That the three children take a life interest in such trust estate, share and share alike.

7. That as each of the said children of testatrix dies, an undivided one-third part of the principal of such trust fund shall be paid over to the issue of such deceased child equally, or if no such issue survive such deceased child, then to the husband or wife, as the case may be, if any surviving such deceased child; if there be surviving neither issue, husband, nor wife, then such undivided one-third part of the principal of the trust estate shall still form a part of such trust and be disposed of in the same manner for the benefit of the surviving children or child of the testatrix and their or its issue, husband, or wife; the surviving issue of any deceased child to take by right of representation.

8. At the death of the last surviving child of the testatrix, there then being surviving no issue, husband, or wife of any of the children of testatrix, then any balance of the trust fund remaining shall be paid over to Dorothy Kershaw, testatrix's cousin, if then living, otherwise to the other cousin, Mary Christie Emmons.

9. That a trustee be appointed either by choice of the parties or by order of the court to administer said trust; that such trustee take title to all the property, real and per-

sonal, with the power, under the direction of the court, to sell, convey, and pass title to such property, either real or personal, and to invest and reinvest the proceeds thereof.

The three children of Mrs. Smith have appealed to this court from so much of the judgment construing the will as in effect gives the three children a life estate merely in and not absolute title to the residue and bulk of the estate, and from so much thereof as declares the creation of a trust to administer said estate; and from so much as in effect determines that the children do not have at least a vested estate in the bulk of said estate, both real and personal, subject to be divested upon the happening of certain contingencies; and to so much thereof as in effect declares that the children are not entitled to the present possession of the property without intervention of a trustee and to the absolute use of the income thereof and portions of the principal as may be required.

The construction of this will in the court below is supported here on behalf of the unascertained remaindermen by their guardian *ad litem,* Mr. Joseph H. Marshutz.

Edgar L. Wood of Milwaukee, for the appellants.

For the respondents there was a brief by *J. H. Marshutz,* guardian *ad litem,* and *I. A. Fish,* of counsel, both of Milwaukee; and the cause was argued orally by *Mr. Marshutz.*

The following opinion was filed January 10, 1922:

ESCHWEILER, J. While the will of a testator, when not violating statutory or judicial prohibitions, should be the law of his will, the one here presents difficulties in arriving at any satisfactory conclusion as to what were the mental conclusions of the testatrix, at the time she executed the document, as to her wishes for the future disposition of her property.

At the time she made her will Mrs. Smith possessed but a relatively small amount of property, principally bank stock and certain real estate in Appleton. Some of the real estate

was sold by her, and by far the greater part of her estate came to her by inheritance from her father a number of years after the making of the will and about two years preceding her own death, and is mainly personal property.

Before discussion of the principal questions involved it is necessary to decide the contention urged on behalf of the three children of Mrs. Smith, the appellants here, that the real estate she acquired by inheritance from her father, being acquired subsequent to the making of the will, did not pass thereby and should be disposed of as intestate property. This raises the question whether it manifestly appears by the will, pursuant to sec. 2279, Stats., that it was her intention that her after-acquired real property should pass by the provisions of the will. The will makes specific devises and bequests of the property she had at the time of the making of the will. It then groups, for the purpose of distribution, all the rest and residue of her property, real, personal, or mixed, in possession or expectancy. The term *expectancy* is of significance and weight in this respect. Its use in the will distinguishes property she might thereafter acquire from property then in her possession. By the language used she expressed what must be considered in law an intention to dispose of subsequently acquired personal property, and by the same expression she also included real property. There is nothing restricting the term *expectancy* to personal property merely. It is clear, therefore, that the will does show on its face an intention of the testatrix to dispose thereby of her after-acquired real estate, and the trial court was correct in so holding.

The two main questions presented are: first, what is the nature of the property interest that is given to her children; second, whether there are sufficient directions in the will to require the appointment of a trustee and the creation of a trust to administer her residuary property, either personal or real, or both.

The appellants contend that under these provisions it must be held that the children received absolute title to both the real and personal property included in the residuary clauses, or, in case such contention cannot be sustained, that then it should be held that they take a present title to such property with the right to the possession thereof, the income therefrom, and possibly the use of some or all of the principal thereof during their lives, with possible conditions subsequent thereto attached.

By the first sentence of the residuary clause the testatrix gives, devises, and bequeaths to her daughter and the two sons, share and share alike, all the rest and residue of her property. If the clause had ended there it would have ended the present difficulty. It would have given to the three children complete and absolute title to her personal property. It would have given the same complete and absolute title to the real property that she herself had at the time of her death, for evidently under sec. 2278, Stats., such would be the effect of the will, it not clearly appearing therefrom that she intended to convey any lesser estate.

Were such her intention, then the children and not she would have the absolute and uncontrollable right, so far as any wish on her part was concerned, to dispose of the respective shares which they would receive under her will at the time of her death, or title thereto would pass from them by the statute regulating distribution of estates, they dying intestate after her decease. She indicates, however, plainly that she desires a voice and choice in the distribution of her property under conditions and contingencies which cannot arise until after her death. The situation in that respect here is somewhat similar to that discussed in the case of *Will of Elmore,* 165 Wis. 266, 271, 162 N. W. 438.

She has in mind as possible beneficiaries of her property at least three distinct classes, namely: first, her own children specifically designated by name; second, the children

born to any or all of her designated three children; and third, the spouse, if any, surviving the death without issue of any of her designated three children.

To construe the will as contended for by appellants, as giving to them, the first of such classes, the entire title and interest in and to her residuary property, would necessarily set aside and disregard all of the language that she uses in the will with reference to those other classes of possible beneficiaries. Furthermore, it must be noted that to only one of the three of the above mentioned classes is it declared that title to any of her property shall go absolutely (thereby evidently including the idea of complete and full title, possession, and control), and that one is the second of such classes, namely, the child or children of her own children. If it can be said that she indicates anywhere in the clauses of her will now under consideration an intention to favor any particular one of the three classes over the others, it would be the second of those classes rather than the class made up of her three children. And it should be noted that this second class refers to a class who may come into existence either before her own death or subsequent thereto, so that the children of a child predeceasing the testatrix form a class specific and definite at the time of the death of the testatrix and then step absolutely and completely into the share meant for their parent, and children, born or unborn at the time of the testatrix's death, by the death of a child of the testatrix subsequent to her own death step in, at the time of such subsequent death, to a definite and fixed one-third share of the residuary property, and which one-third share became fixed and definite at the time of Mrs. Smith's death.

Under these considerations we are satisfied that we must say that there appears on the face of this instrument an intention on her part to limit the interest and estate given to each of her three children to a life estate merely. *Knox v. Knox*, 59 Wis. 172, 18 N. W. 155; *Allen v. Boomer*, 82

Wis. 364, 371, 52 N. W. 426; *Swarthout v. Swarthout,* 111 Wis. 102, 111, 86 N. W. 558; *Meinert v. Roeglin,* 169 Wis. 531, 532, 173 N. W. 224.

These considerations, as well as the further feature that in all her directions as to what is to be done upon the death of any of her children either before her own death or after the term is invariably used as of such child's share rather than any remaining portion of any such share, compel us to hold that it was not the intention of the testatrix, so far as it can be spelled out from the will itself, that the children should have the right to consume for their own purposes any of the principal of such respective shares. *Schneider v. Schneider,* 124 Wis. 111, 102 N. W. 232; *Meyer v. Garthwaite,* 92 Wis. 571, 575, 66 N. W. 704; *Jones v. Jones,* 66 Wis. 310, 317, 28 N. W. 177. The omission of any declaration by the testatrix that her children shall have the right to use or consume or have power and control over any portion of such shares, must be construed as significant and important, in view of the weight attached to the use of such terms in cases like *Otjen v. Frohbach,* 148 Wis. 301, 309, 312, 134 N. W. 832, and cases there cited; *Will of Olson,* 165 Wis. 409, 411, 162 N. W. 429.

The trial court also held that in the event either of the children of Mrs. Smith should now die leaving no surviving issue but a surviving spouse, such surviving spouse should receive absolutely the then present interest of such deceased child. There is no express language in the will expressly so declaring such as is found with reference to any surviving issue of such child, and while it may seem rather a strained construction to hold that such surviving spouse was intended to take to the exclusion of any surviving child or children of Mrs. Smith and to the exclusion of the ultimate remaindermen in the absence of express language to that effect, nevertheless we must adopt the view of the trial court in that regard. To hold otherwise would be to ignore the evident purpose of the testatrix to create such a possible class of

beneficiaries and to whom she expressly refers several times in the residuary clauses of her will. If they were not intended to be the objects of her bounty there was no reason for their being mentioned at all in the will. The reference to them, if given any other effect, would apparently suspend, during the life of such surviving spouse of a child dying without issue, any vesting anywhere of the estate and interest of such child of Mrs. Smith. We think, therefore, it is a proper construction of this will to hold as did the trial court that in the event of any death hereafter occurring to any child of Mrs. Smith who shall leave no issue but a surviving spouse, such surviving spouse shall then step into absolute possession and control of the share that such child of Mrs. Smith shall have a life estate in at the time of the death of such child.

Having held that the three living children of the testatrix each takes but a life estate under the residuary clause and are not entitled to the possession or use of any part of the *corpus* of such property, the conclusion is necessarily arrived at that to effectuate the purposes indicated in the residuary clauses in question as indicated above, some method must be provided by the court having jurisdiction over its administration that the *corpus* be preserved in the interests of the ultimate remaindermen, and that during such necessary period it be properly conserved and the income thereof paid to those holding the respective life estates therein.

There is no express language in the will indicating that the appointment of a trustee or the creation of a trust was purposed by the testatrix when the will was drawn and executed, nor is there to be found any direction as to the manner in which such suggested trust should be carried on, nor is any express language used indicating an intention on her part that the real estate she had at the time of her death, other than the Appleton property, was to be converted into personal property and the proceeds thereof administered

with the balance of the personal property. Manifestly such suggested omitted provisions are each and all material and important elements in the creation and conducting of any trust. *Otjen v. Frohbach,* 148 Wis. 301, 308, 134 N. W. 832. Their omission, however, so far as any express language is concerned, does not necessarily deprive the court administering the estate of the power to declare such a trust created and to appoint a trustee, nor warrant avoiding the responsibility so properly assumed, as we now hold, by the trial court in so declaring.

To carry out what has now been declared to be the purposes of the will there is no other proper method known to the administration of the estates of deceased persons whereby such declared purposes of the testator can be effectually carried out. This, therefore, makes it the duty and gives the power to the court to do that which was done by the court below.

It is suggested that, there being real estate of considerable value included in the residuary clauses, to declare a trust as to such real estate for the purposes now held to have been the intention of the testatrix with regard to her residuary property would be to offend against the provisions of the statute, sec. 2041, because the successive estates for life created were to three rather than two children of the testatrix in being at the time her will took effect.

Under the rule declared in this state it has long been held that where, as here, a very substantial part of the property involved is personal property, the validity of a trust for which is in nowise impaired by any rule against perpetuities, it is proper to consider if there be evident in the will a broad general direction, to be read by implication therefrom when necessary as in this particular instance, that the property is to be conserved as a whole. Particularly is that so where, as here, a very considerable portion of the real estate involved is unimproved property and the great bulk of the

property included in the residuary clauses is personal property. From all this it is legally and imperatively apparent that to effectually carry out the now declared purpose of the testatrix the real estate should be converted into personal property and the entire amount of the property then administered as such. This doctrine has been settled as the law of this state in the case of *Becker v. Chester,* 115 Wis. 90, 117, 91 N. W. 87, 650, and subsequent cases such as *Wolbert v. Beard,* 128 Wis. 391, 395, 107 N. W. 663; *Swarthout v. Swarthout,* 111 Wis. 102, 111, 86 N. W. 558; *Danforth v. Oshkosh,* 119 Wis. 262, 275, 97 N. W. 258; *Benner v. Mauer,* 133 Wis. 325, 329, 113 N. W. 663; *Williams v. Williams,* 135 Wis. 60, 67, 115 N. W. 342; *Foote v. Foote,* 159 Wis. 179, 184, 149 N. W. 738, and it needs no further discussion.

The disposition we have now made of this matter renders unnecessary discussion of any of the other matters presented and argued.

By the Court.—Judgment affirmed.

ROSENBERRY, J. (*dissenting*). I regret that I am unable to agree with the court in the disposition of this case. To my mind a very much more satisfactory disposition of the case would be to hold the residuary clause void for uncertainty. 1 Schouler, Wills (5th ed.) § 591; 6 L. R. A. N. S. p. 976, sub. XVI. Realizing, however, that it is the duty of the court, if possible, to place upon the will some interpretation which will sustain it, I am convinced that it was the purpose of the testatrix to give the residue of her property to her children absolutely, with a proviso that if they should die unmarried or without issue such estate as then remained should be disposed of to the persons named. I cannot persuade myself that the testatrix ever intended to limit the enjoyment of her estate in the hands of her children to the income thereof during the term of their natural lives, and I cannot escape the conclusion that the disposition now

made of her estate is one never contemplated by the testatrix.

Mr. Justice OWEN concurs in this dissent.

A motion for a rehearing was denied, without costs, on April 11, 1922.

ISGRO, Respondent, vs. PLANKINTON PACKING COMPANY, Appellant.

December 15, 1921—April 11, 1922.

Automobiles: Injury to laborer working in street: Negligence: Questions for jury.

1. The question whether a defendant was guilty of any negligence which proximately caused plaintiff's injury is for the jury, if there is any credible evidence which to a reasonable mind would support any inference of negligence.
2. In an action for injuries received by a laborer working in a street, both the question as to whether the driver of an automobile truck was negligent in failing to give warning of his approach, and the question whether the laborer was negligent in pushing a wheelbarrow along a passageway in the street, are for the jury, and, there being evidence to sustain their verdict, it will not be disturbed.
3. A laborer engaged in pavement construction work was not required to use the same degree of care to avoid injury from automobiles using the street as an ordinary traveler thereon.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Affirmed.*

The appeal is from a judgment awarding damages to the plaintiff for personal injuries sustained as a result of being struck by defendant's automobile truck.

Plaintiff, an Italian laborer working for the Milwaukee Electric Railway & Light Company, on the 25th day of February, 1919, while wheeling a wheelbarrow loaded with crushed stone on Lisbon avenue in the city of Milwaukee,

was struck by the defendant's automobile, as the result whereof he sustained serious injuries to his right lower limb.

The evidence shows that Lisbon avenue, a public street in the city of Milwaukee running northwesterly and southeasterly, is intersected by double tracks of the Chicago, Milwaukee & St. Paul Railway Company, and that it has located thereon, at the usual place for street-car tracks, two tracks of the Milwaukee Electric Railway & Light Company. On the date of the injury the pavement between the railroad tracks and the street-car tracks had been torn up, and the employees of the street car company were engaged in relaying such pavement. To the south of a line extended across said St. Paul tracks, representing the continuation of the curb on the north side of the avenue, a space of about ten feet in width was planked, and this planked space afforded the only passageway for vehicles traveling towards the west on said Lisbon avenue. On the north side of said avenue and close to the curb, and a distance of between thirty and forty feet east of the easterly railroad track, there was a pile of crushed stone, extending out from the curb into the avenue a distance of about eight feet. Plaintiff on the day in question, after having loaded his barrow with crushed stone, looked toward the east and there discovered the defendant's truck coming westerly, a distance away of about 250 to 300 feet. Thereupon he took his wheelbarrow and wheeled the same, loaded as aforesaid, towards the west until he arrived at a point about one foot east of the easterly rail of the easterly track of said railroad company, and there set his wheelbarrow down. He had then arrived at the planked crossing above described. He then discovered the defendant's truck a distance of between 80 and 120 feet towards the east from where he then stood, and, apparently concluding that he had ample time in which to cross over said planked crossing, he continued with his wheelbarrow towards the west until he arrived at the easterly rail of the westerly track of the railroad company, at which point he

claims to have been struck upon his right arm by the south front fender of the truck, as the result whereof he was turned about, and when the truck had proceeded so that the left rear wheel was about opposite from where he was then standing such wheel came in contact with his right lower limb, causing a wound which is described by Dr. Lemon as follows:

"He had a dissecting wound of the skin on the back of the foot which extended from the inner to the outer side of the foot in a transverse line, dissecting down the skin and the soft parts immediately under the skin, dissecting them away from the bone and from the large ligament or tendon, which is found on the back of the foot, namely, the tendon Achilles, . . . as though the cap of the skin on the back of the foot had turned or stripped right down; . . . the tissues were not materially injured at all other than by being dissected down."

The plaintiff, testifying through the aid of an interpreter, describes the happening of the injury as follows: "The truck hit me and turned me around and then the wheel passed over my leg and knocked me down."

The evidence also shows that when the plaintiff was picked up after the injury he was lying west of the westerly track of the railroad company. The evidence does not disclose that any other witness excepting plaintiff saw just how the accident happened.

Dr. Lemon also testified as an expert that the injury was the result of a force applied anatomically from above downward, and could have been inflicted either while he was standing up or while he was lying down.

Peters, defendant's employee and the driver of the truck, testified that he sat on the left-hand side on the seat, the truck having a left-hand drive, and that a helper named Devine sat on the same seat, to the right of him. Both the driver and Devine testified that they first saw the plaintiff when he was about fifty or sixty feet away, while he was crossing with his wheelbarrow from the north to the south of the

planking, and that the driver then called out to him to get out of the way, and that the plaintiff looked at him and kept going towards the south, looking at the truck as he was doing so; that when the plaintiff had arrived with his barrow at a point in close proximity to the northerly rail of the northerly street-car track, he put down his barrow and stood between the handles thereof, looking toward the east, and that when the front wheels of the truck passed plaintiff the truck was about one foot distant from him, and that after the front wheels had passed, both he and Devine looked towards the rear, and as the rear left wheel came opposite to where the plaintiff then stood they saw him falling over, "like a statue and did not move." Both Peters and Devine testified that plaintiff fell with his head towards the west and his feet towards the east, and that he was picked up immediately west of the westerly track of the railroad company, and that no portion of the automobile at any time came in contact with the plaintiff, and that the rear left wheel did not pass over his foot.

Roy Muehl, defendant's witness, testified as an expert that the truck in question was a three-ton truck, standard make; that it has a first, second, third, and fourth speed, and a reverse; that the maximum speed in number one is 2 miles per hour, in number two 4 miles, in number three 8.1, and in number four 12 miles, and in reverse 2 miles; that over the front wheels there were fenders which projected forward to a distance of about sixteen inches back of the extreme front end of the wheels, and that the front fenders project toward and over the outer side of the wheels a distance of about two inches; that the height of the front part of the front fenders is three feet five inches above the base of the wheel; the hubs of the front wheels extend sideways beyond the fender five inches, in other words the hub is five inches over all, and the end of the hub cap extends seven inches beyond the tread of the wheel; that the width of the truck

over all is seven feet six inches from hub cap to hub cap, and the truck is nineteen feet nine inches long. It also appears that the truck had solid tires and that there extended outwardly beyond such tires a steel rim.

The plaintiff testified that after he was precipitated to the ground he was lying with his head toward the south and his feet towards the north.

The jury in the special verdict submitted found (1) that the driver of the defendant's truck failed to exercise ordinary care in the management and control thereof at and immediately prior to the time plaintiff was injured; (2) that such failure was the proximate cause of the injury; (3) that the plaintiff was not guilty of a want of ordinary care which proximately contributed to produce the injury.

For the appellant there was a brief by *McGovern, Hannan, Devos & Reiss* of Milwaukee, and oral argument by *F. E. McGovern* and *Wallace Reiss.*

William L. Tibbs of Milwaukee, for the respondent.

The following opinion was filed February 7, 1922:

DOERFLER, J. 1. Was the defendant guilty of negligence which proximately caused the injury? In considering this question we must determine whether there was any credible evidence in the case supporting the finding of the jury on that subject. If there was such credible evidence which to a reasonable mind can support any inference in favor of a party, the question is for the jury. *Smith v. Reed,* 141 Wis. 483, 486, 124 N. W. 489.

It has been held in *Behling v. Wis. B. & I. Co.* 158 Wis. 584, 591, 149 N. W. 484, that:

"Failure in any case, and especially where to disturb the verdict rests in sound discretion, leaves, in general, very little opportunity for relief because of the weight accorded to a trial court's decision, and the rule that evidence, to be entirely incredible, must be contrary to conceded facts, or matter of common knowledge, or to all reasonable probabili-

ties, that being, generally, restricted to cases where the evidence is inherently unbelievable because physically impossible, or for some other cause."

With the law of this state as above set forth, let us view the evidence in regard to defendant's alleged negligence. As defendant's truck approached the railway crossing it at no time went beyond a speed of twelve miles per hour. This was a physical fact established in the evidence, against which the testimony of witnesses is unavailable. The truck, therefore, was not going to exceed twelve miles an hour when plaintiff first saw it as he picked up his barrow at the heap of crushed stone, and it did not exceed that limit when the plaintiff arrived just east of the easterly railroad track. The driver testified that he did not see the plaintiff until he was within fifty or sixty feet from him, and that plaintiff was wheeling his barrow on the planking towards the south, and that instead of blowing a horn or giving some other signal he hollered to the plaintiff to get out of his way. On the other hand, plaintiff testified that he was wheeling towards the west and had his back towards the truck and that no signal or warning of the approach of the truck had been given. Here we find a sharp conflict in the evidence on the two sides of the case, and while the evidence of the driver and his companion is not improbable, nevertheless, in view of the location whence the plaintiff came, and his destination, and the surrounding facts and circumstances, we are inclined to believe that plaintiff's version is more probable than that claimed by the driver; at any rate the fact was a proper one to be submitted to and determined by the jury.

Plaintiff claimed that he first saw the truck a distance of about 250 feet towards the east, and on the occasion when he looked the second time the truck was about eighty or more feet distant from him. The driver testified that when he first saw the plaintiff and his barrow he was about fifty feet distant from them, thus presenting a situation from

which the jury could readily infer that the driver was not having a proper lookout ahead of him, for there is nothing in the evidence to show that the driver's view could in any way have been obstructed. Before the truck arrived at the narrow plank crossing, ample opportunity was afforded the driver to ascertain the width of the passageway and the accompanying danger of more than one vehicle crossing the same at the same time. According to the driver's own testimony, the truck was so constructed and was under such control that it could have been stopped at any time within a distance of two feet. There being ample credible evidence to sustain the plaintiff's version that he was traveling west on the narrow planking at the time he was struck by the front left fender of the truck, in view of all the facts and circumstances in the case as detailed, the fact was properly before the jury as to whether plaintiff's version in that regard was correct or not. The jury evidently determined that it was correct.

Plaintiff testified that he was struck by the left front fender on or about the elbow of his right arm while he was wheeling his barrow. This claim of the plaintiff is not only credible but highly probable, for it appears from the evidence that the front fender would be at or about the level of the location of plaintiff's right elbow while he was wheeling the barrow. And his testimony is also credible and highly probable that the force thus applied turned him about, so that when the rear left wheel of the truck arrived opposite him his position had been so changed that such rear wheel came in contact with the lower part of his right foot, causing the injuries complained of and precipitating him to the road. While the driver and his companion both testified positively that as the rear left wheel of the truck passed the plaintiff they both looked backward and that no portion of the truck touched the plaintiff, nevertheless, in view of the injury which resulted, it appears conclusive to our minds that such injury was inflicted by the rear left

wheel of the truck coming in contact with plaintiff's lower right limb. If evidence were needed to corroborate the infliction of the injury in that manner, the testimony of the driver and his companion amply furnishes the same, for both testified that when the rear left wheel came to a point opposite where plaintiff was standing they saw him falling over like a statue. This can readily be explained by the fact that the wheel came in contact with the lower portion of plaintiff's right lower limb, which prevented him from falling in the ordinary manner and which explains the statue-like falling as contended for by the driver and his companion.

We thus have the situation presented of a three-ton truck, laden down by a ton or more of weight, under full and absolute control of the driver, approaching the plaintiff from the rear, while he was laboring under the burden resting on him while wheeling the heavy barrow of crushed stone, in an attempt to clear the narrow passageway in time so as to avoid a collision with the truck. Can we say, under these circumstances, that the situation presented did not constitute a proper question for the jury on the subject of the negligence of the driver of the truck?

The degree of care which it is necessary for a driver of an auto vehicle under such circumstances to exercise is fixed to a large extent by the necessity of conserving human life and limb. It was fully within the power of the driver to size up the situation, either before he entered upon the passageway or before he attempted to cross the westerly railway tracks, by so regulating the operation of his car or by stopping it, as to prevent the injury. Such a slight degree of thoughtfulness and patience would have avoided not only much human suffering but would have saved whole an humble but productive member of society.

2. Was the plaintiff guilty of contributory negligence as a matter of law?

At the time of the injury the plaintiff was engaged as a laborer in performing construction work in the relaying of

a pavement between the street-car tracks and the railway tracks. He occupied a different position with respect to the degree of care required of him than an ordinary traveler upon the highway. In *Dinan v. Chicago & M. E. R. Co.* 164 Wis. 295, 159 N. W. 944, it was held:

"A man who is engaged in work upon the highway cannot, if he performs his duty, spend a large part of his time in looking for the approach of street cars or other vehicles. In a busy street he would accomplish little if he did so. Of course he cannot let his thoughts go wool-gathering and expect all users of the highway to give place to him; he must exercise some vigilance; he must keep that lookout for vehicles and cars which an ordinarily careful man similarly situated would keep; a man who is compelled to be in the street and to be giving attention to his work. Such care must manifestly be a lesser degree than the care required of a person who is on the highway for the purpose of travel alone and may come and go at will. This court has affirmed the principle in *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948, and other courts have adopted the same rule. *Graves v. Portland R., L. & P. Co.* 66 Oreg. 232, 134 Pac. 1; *Lewis v. Binghamton R. Co.* 35 App. Div. 12, 54 N. Y. Supp. 452. See 2 Thompson, Comm. on Neg. § 1463."

So that when plaintiff arrived at the east railway track and saw the defendant's truck eighty or more feet distant, he had not only a duty to perform towards his employer but a duty to exercise a degree of vigilance with respect to the oncoming truck. He made his observations, and he saw before him a narrow passageway, about ten or more feet in width, which both he and the truck were obliged to pass. He evidently calculated that he would be able to discharge both obligations safely and thus be enabled to clear the passageway in time to avoid a collision. The degree of care required in the instant case of the plaintiff is the degree which an ordinarily careful laborer, similarly occupied and situated, would exercise under the same or similar circumstances. It is sometimes difficult for a man of much higher

intelligence to act correctly under similar circumstances. The plaintiff had a right to be upon the highway and the passageway; nay, he was necessarily there in the performance and discharge of his duty. The driver of the truck could readily observe this. If in discharging his duty and exercising his judgment the plaintiff fell slightly short in the estimate which he made with respect to clearing this passageway in time, it cannot be said as a matter of law that he was guilty of the exercise of a want of ordinary care under the circumstances.

The learned counsel for the defendant, both in the oral argument and in his brief, accepting the version of the defendant's witness that when the plaintiff arrived at the west railway track going south over the passageway he set down his barrow, standing between the handles, and was looking east, and that the truck had safely passed him with the front wheels, evolved the theory (and a theory it was, pure and simple) that the plaintiff concluded that the truck had passed and proceeded to lift the barrow, and in endeavoring to proceed toward the south extended his right foot backward at the time when the left rear wheel of the truck was about to pass, and thereby came in contact with such wheel, as the result whereof the injury was produced. Counsel also contended that that was the only plausible theory which explained the accident. In reply it may be said that there is no evidence whatsoever to substantiate such theory. It is mere speculation and conjecture. On the other hand, there is credible evidence to support plaintiff's version, and surely the jury was justified, under the circumstances, in accepting the same rather than resorting to a theory which had no foundation in fact.

Of course it cannot be logically claimed that the wheel passed over the foot, for if such had been the case the foot would have been crushed and an injury produced entirely different from that shown in the instant case. The jury was justified in either believing and finding that the injury

was occasioned by the rim of the rear left wheel of the truck coming in contact with plaintiff's lower right limb before he fell or while he was lying prone on the ground, as testified to by defendant's witnesses, with his head lying towards the west and his feet towards the east.

We therefore conclude that there was ample credible evidence to be submitted to the jury upon plaintiff's theory of the happening of the injury, and that, the jury having sustained plaintiff's contention, the judgment of the lower court cannot be disturbed. *Smith v. Reed,* 141 Wis. 483, 486, 124 N. W. 489; *Collier v. Salem,* 146 Wis. 106, 108, 130 N. W. 877; *Barlow v. Foster,* 149 Wis. 613, 621, 136 N. W. 822; *Behling v. Wis. B. & I. Co.* 158 Wis. 584, 149 N. W. 484.

By the Court.—Judgment affirmed.

ROSENBERRY and OWEN, JJ., dissent.

A motion for a rehearing was denied, with $25 costs, on April 11, 1922.

BROCKMAN, Respondent, vs. WERNER and others, imp., Appellants.

December 15, 1921—April 11, 1922.

Contracts: Cost-plus agreements: Modification to include other work: Evidence: Sufficiency.

1. Where a contract to build a one-story garage on a cost-plus basis, not to exceed $32,090, was modified to provide for an additional story, a finding of the trial court that there was no contract to build the additional story for a specific sum, but that it was to be built on the cost-plus basis, is *held* to be supported by the evidence.
2. Such modification of the contract to provide an additional story for the building, necessitating some changes in the first story, is *held* not to abrogate the written agreement limiting the

cost of the building as originally planned. Changes in the original plan, in so far as they increased the cost of the first story, should be considered extras, and any decreased cost should be a credit to the owner.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Action to recover the balance due plaintiff for building a two-story garage and basement for defendants and for a mechanic's lien on the property.

It is undisputed that plaintiff and defendants *Werner* and *Sims* entered into a written contract for the construction of a one-story garage building at a cost-plus basis not to exceed $32,090. After the construction of the building had begun defendants became desirous to add a second story and they claim that plaintiff agreed to build it at a cost of approximately $19,000. This is denied by plaintiff, who claimed that the agreement was that both the first and second story and basement should be built on a cost-plus basis. The court found in favor of the plaintiff and entered judgment for the cost of the entire building with basement and the wrecking of the old buildings plus fourteen per cent. which plaintiff was to receive in addition to the cost of labor and materials, amounting in all to the sum of $74,693.14, less $44,000 paid, leaving a balance of $30,693.14 and interest. From such judgment the defendants *Werner* and *Sims* appealed.

For the appellants *Werner* there was a brief by *A. J. Schmitz* of Milwaukee, and for the appellants *Sims* a brief by *Olwell, Durant & Brady* of Milwaukee; and the cause was argued orally by *Mr. Lawrence A. Olwell* and *Mr. Schmitz.*

For the respondent there was a brief by *Alexander & Burke* of Milwaukee, and oral argument by *Frank P. Burke.*

The following opinion was filed February 7, 1922:

VINJE, J. Since a new trial must be had upon a new basis many of the questions argued drop out. The case presents almost exclusively questions of fact, and all the findings of the learned trial court are sustained except the one that finds that the original contract for a one-story building without a basement for cost-plus not to exceed $32,090 was abrogated when the agreement as to the second story was entered into. We need not go into all the details as to how plans were suggested, modified, and abandoned before the contract mentioned was entered into. Both parties admit the execution of the first contract, which was in writing and was based upon plans and specifications furnished by Mr. Koch, plaintiff's employee and architect. When the construction of the first story was under way but before it had progressed far, negotiations for the addition of a second story and basement began, and it is the claim of defendants that plaintiff agreed to build the second story, not including some extras such as elevator, etc., for approximately $19,000. This claim is based upon a conversation that *Werner* and *Sims* had with Koch, in which the latter furnished a rough estimate, based upon an estimated cubic foot price, at $24,000, which later *Werner* claims was reduced to $19,000. Koch denies he ever furnished any estimate for $19,000, much less agreed on behalf of plaintiff to build the second story for approximately such amount. His testimony is that *Werner* came back the next day after the $24,000 estimate was furnished and that he and *Werner* had some further talk about the building and the second story and basement and that finally *Werner* said, "Well, I guess you better go ahead," and that Koch then said, "That will be on a percentage basis?" and that *Werner* answered, "Sure, that is the better way anyhow." This sums up the substance of the direct testimony on the subject. The trial

court saw the witnesses, and it was peculiarly within his discretion to judge as to who was the more credible. There are a number of considerations that lead us to believe that no oral contract to construct the second story for approximately $19,000 was ever made. In the first place that is not a usual way to transact business of such magnitude, especially where, as here, there is no evidence as to just how the second story should be constructed either as to materials, partitions, openings, or otherwise. In the second place it is uncontradicted that plaintiff from time to time consulted with defendants as to the mode of constructing the second story, as to the size of girders that should be used for the roof, and as to what firm to purchase them from. Many changes in the plan of the first story and foundation walls had to be made and defendants were consulted with reference thereto. We have no doubt that, even if an estimate for $19,000 was made, it never ripened into a contract between the parties. The evidence as to what kind of a second story should be built is too vague to support a contract with reference thereto. The trial court properly found that no such contract was ever made.

But we think it erred when it found that the agreement to build the basement and second story upon a cost-plus basis abrogated the written contract to build the first story at a cost not to exceed $32,090. It is true that a number of changes had to be made in the first story owing to the addition of a basement and second story, but such changes, in so far as they increased the cost, would be extras to be paid for on cost-plus basis, and in so far as they decreased the cost, as for instance the omission of a roof, such decreased cost should be credited to the defendants.

The evidence was not taken upon this basis and we find it impossible to state the account as it should be stated. It is held that the plaintiff can recover for the first story, exclusive of changes therein, extras and basement, the cost plus fourteen per cent., not to exceed $32,090; that for the balance of the building, including the wrecking of the old

building, he is entitled to recover the cost plus fourteen per cent., less credits for old material used as found by the court, and that for the balance he should have a lien as granted in the judgment appealed from. The evidence showed that fourteen per cent. was a reasonable percentage of profit and that amount is not contested by the defendants.

There is some evidence from which it may be inferred that the cost-plus basis should apply to the whole building, but it is not definite and certain enough to have the effect of canceling the written contract between the parties.

It follows that the judgment must be reversed, and the cause remanded for the taking of further evidence, and judgment as indicated in this opinion with costs in favor of defendants.

By the Court.—It is so ordered.

A motion for a rehearing was denied, with $25 costs, on April 11, 1922.

ANDERSON, Plaintiff, vs. MILLER SCRAP IRON COMPANY, Appellant, and HERMAN MILLER, Respondent.

March 9—May 3, 1921.
December 16, 1921—April 11, 1922.

Workmen's compensation: Place of accident: What law governs: Payment of compensation to widow as assignment of claim against third person: Action by administrator: Cause of action created by laws of sister state.

1. An application for workmen's compensation by an employee operates, under sec. 2394—25, Stats., as an assignment of any cause of action that the employee may have against a third person; and when compensation is paid to the dependents of the employee, the cause of action existing by virtue of the statutes (sec. 4255) in favor of the personal representatives of the employee to recover damages for the death of such employee is assigned to the employer.

2. An application by a widow of the employee for compensation does not operate as an assignment of a cause of action existing by virtue of the statutes of a sister state in favor of the personal representatives of an employee, as the widow does not own such cause of action, and neither the legislature nor the courts of one state have power to interfere with a cause of action created by the laws of a sister state.

On rehearing:

3. Where the accident causing death occurred in another state, the rights and liabilities of the parties are fixed by the laws of such state.
4. Where an employee who died as the result of an accident occurring in the state of Michigan did not make claim for workmen's compensation during his lifetime or assign the cause of action, the payment of compensation on the application of the surviving widow did not operate as an assignment of the cause of action, sec. 14578 of the Compiled Laws of Michigan of 1915 vesting the cause of action in such employee and after his death in his personal representatives.

[5. The assumption that this action was based on the death statute of Michigan, whereas it is based on the survival act of that state, does not affect the conclusion of the original opinion.]

ESCHWEILER, J., dissents.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Modified and affirmed.*

This action was commenced to recover damages resulting from the wrongful death of plaintiff's decedent. He was an employee of the *Miller Scrap Iron Company.* The *Miller Scrap Iron Company* and the decedent were both residents of Wisconsin. The contract of employment was a Wisconsin contract, and both were under the workmen's compensation act. Death occurred by reason of the overturning of an automobile driven by *Herman Miller,* an officer of the *Miller Scrap Iron Company,* in the state of Michigan, while on the way to the performance of certain work for the *Miller Scrap Iron Company.* Upon appeal the judgment rendered in favor of the plaintiff was reversed by this court in an opinion to be found in 169 Wis. 106, 170 N. W. 275, 171 N. W. 935, to which reference is made for a more complete statement of the facts of the case. It

was reversed as to *Herman Miller* upon plaintiff's request that if the judgment should be reversed as to the *Miller Scrap Iron Company* it should also be reversed as to *Herman Miller.* Upon *remittitur* to the lower court a motion was made on behalf of both defendants to dismiss the action on the merits. No objection was made to the dismissal of the action as to the *Miller Scrap Iron Company.* The plaintiff and the *Miller Scrap Iron Company* both objected to the dismissal of the action as to the defendant *Herman Miller.* The motion, however, was granted, and from the order granting such motion the *Miller Scrap Iron Company* brings this appeal.

For the appellant there were briefs by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondent there were briefs by *Kittell, Jaseph & Young* of Green Bay, and oral argument by *Lynn D. Jaseph.*

The following opinion was filed May 3, 1921:

OWEN, J. After the decision in this case, reported in 169 Wis. 106, 170 N. W. 275, 171 N. W. 935, the widow, Mrs. Boncher, made application for compensation under the provisions of the workmen's compensation act. The industrial commission made an award in her favor, which award was affirmed by this court in *Miller Scrap Iron Co. v. Boncher,* 173 Wis. 257, 180 N. W. 826. The *Miller Scrap Iron Company* claims that it has acquired this cause of action and is entitled to continue the prosecution thereof against *Herman Miller;* that it was aggrieved by the dismissal of the action as to *Herman Miller* by the lower court, and brings this appeal to secure a reversal of such judgment of dismissal.

For its title to the cause of action set forth in the complaint appellant relies upon sec. 2394—25, Stats., which provides:

"The making of a lawful claim against an employer or compensation insurer for compensation under sections

2394—3 to 2394—31, inclusive, for the injury or death of an employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer or insurer may enforce in their own name or names the liability of such other party for their benefit as their interests may appear."

No doubt this statute operates as an assignment of any cause of action that the employer may have against a third party where the employee is the applicant for compensation. It is equally clear that it operates as an assignment of any cause of action existing by virtue of the statutes of this state in favor of the personal representatives of the employee to recover damages for his death where such personal representatives are applicants for compensation. Where the employee is the applicant the law which entitles him to compensation requires as a condition thereof that such claim be assigned, and when he applies for compensation he consents to the assignment. Then, too, under our prior ruling in this case, the compensation law enters into and becomes a part of the contract of employment between the employer and employee where both are under the act, "not as a covenant thereof but to the extent that the law of the land is a part of every contract." It is a part of the contract of employment, therefore, that in case of injury the employee shall be compensated according to the provisions of the compensation act, which provides that any claim the employer may have for damages against third persons stands assigned to the employer upon his paying compensation.

But it is obvious that the employee cannot by contract, in his lifetime, assign a cause of action which the law creates in favor of his dependents, his personal representatives, or his estate to recover damages on account of his death by wrongful act. That is a cause of action created not for his benefit but for the benefit of those who survive him. He has no interest therein during his lifetime. It does not

accrue until his death. Manifestly he cannot assign that cause of action to any one, for the simple reason that he has no interest therein. But as the compensation act becomes a part of his contract of employment, the liability of the employer is fixed by the terms of that act, as held in the prior decision of this case.

Sec. 4255, Stats., gives rise to a cause of action in favor of the persons therein mentioned for the recovery of damages where death results from the wrongful act of another. Where an employee comes to his death through the wrongful act of his employer, sec. 4255 must be read in connection with the provisions of the workmen's compensation act. That act modifies the provisions of sec. 4255 so far as the liability of an employer for the death of his employee is concerned. Where the relation of employer and employee exists, the personal representatives of the deceased, or his dependents, are to be compensated not under sec. 4255 but by virtue of the compensation act. This is because the legislature, which gave rise to the cause of action created by sec. 4255, having full power to change, alter, or repeal the same, has seen fit to provide that the liability of an employer for the death of his employee shall be of a different nature, and that when the employer pays the compensation required by the terms of the compensation act the cause of action created by sec. 4255 against a third party shall be assigned to him as a matter of law.

There is no difficulty in arriving at this conclusion where the cause of action against the third party arises under and by virtue of the statutes of this state. That cause of action is at all times under the control of the legislature of this state, which body may provide a different remedy under certain conditions, and provide that when the employer pays compensation the cause of action which the personal representatives of the deceased had against a third party shall stand assigned to the employer.

But we have a different situation where the cause of action against such third party arises by virtue of a statute of a sister state. The cause of action against *Herman Miller* is based on a statute of the state of Michigan. Now the question is, How does the *Miller Scrap Iron Company* acquire the right which the statute of the state of Michigan vests in the administratrix of the estate of Boncher to that cause of action? Manifestly such a transition of title cannot be attributed to any act of Boncher during his lifetime, because, as already pointed out, he had no title thereto and was impotent to convey title to any one else. The legislature of this state is powerless to modify that cause of action as between an employer and the personal representatives of an employee, as it plainly may do where the cause of action is created by the laws of this state. The liability of *Herman Miller* is created by the Michigan statute. The liability is in favor of the Boncher estate. The proceeds belong to the estate. They do not belong exclusively to the widow, or to those defined as dependents by our compensation act. To recognize the right of the legislature of this state to say that certain conditions shall operate as an assignment of that cause of action, or that it shall inure to the benefit of any except those specified by the law of Michigan, is to ascribe to the legislature of this state extraterritorial power. To apply the provisions of the workmen's compensation act to the present cause of action is to take away from some of the beneficiaries of that cause of action the benefits thereof and confer them upon another. Neither the legislature nor the courts of this state have power to interfere with a cause of action created by the laws of a sister state. It is very plain that the *Miller Scrap Iron Company* derives no title to the cause of action set up in the complaint, by virtue of the laws of this state, and that the section of the statute heretofore quoted, while effectual to transfer to the employer a cause of action arising under the laws of

this state, is not effectual for that purpose where the cause of action arises by virtue of a statute of a sister state.

It is equally clear, for reasons stated in our opinion in *Miller Scrap Iron Co. v. Boncher,* 173 Wis. 257, 180 N. W. 826, that the application for compensation made by the widow cannot operate as an assignment of the cause of action, for the simple reason that she does not own the same. For the very reason that the prosecution of the action by the administratrix could not be held to constitute a waiver of compensation on the part of the widow, as was pointed out in that case, it must be held that the widow's application for compensation does not amount to an assignment of that cause of action. As she does not own the cause of action she is powerless to make an assignment thereof. Much less can an assignment result as a matter of law from any act or conduct on her part.

From these considerations it results that the *Miller Scrap Iron Company* has acquired no title to the cause of action existing under and by virtue of the Michigan statutes. That is the cause of action, and the only cause of action, set forth in the complaint in this case. The *Miller Scrap Iron Company,* therefore, is in nowise concerned with the disposition of the case made by the lower court. The only one prejudicially affected by that judgment is the plaintiff, the administratrix of the estate, and she has not appealed. As the appellant has no interest in the cause of action set forth in the complaint, and is not affected by the judgment dismissing the action as to *Herman Miller,* it is unnecessary for us to consider whether the action of the lower court was consistent with the mandate of this court on the former appeal. That question could be raised only upon the appeal of the administratrix, who has apparently acquiesced in the trial court's disposition of the case.

In view of the fact, however, that the *Miller Scrap Iron Company* may have some further remedy against *Herman*

Miller in the nature of indemnity or otherwise, we think that should it see fit to institute proceedings to enforce any right it may have against *Herman Miller* it should not be embarrassed in the prosecution thereof by questions which may be raised concerning the effect of the judgment entered herein as it relates to other causes of action which the *Miller Scrap Iron Company* may have against *Herman Miller*. We think, therefore, the judgment should be modified so as to indicate plainly that as between the *Miller Scrap Iron Company* and *Herman Miller* the action is dismissed without prejudice to the rights of the *Miller Scrap Iron Company*.

By the Court.—The judgment is modified so as to read as follows: It is ordered and adjudged that the above entitled action be and the same is hereby dismissed on its merits as to the defendant *Miller Scrap Iron Company*. As to the defendant *Herman Miller* it is dismissed on its merits so far as the plaintiff is concerned and without prejudice so far as the *Miller Scrap Iron Company* is concerned. As so modified the judgment is affirmed.

ESCHWEILER, J., dissents.

On October 26, 1921, the following order was made:

A rehearing having been granted herein, it is ordered that the case be placed at the foot of the December, 1921, assignment for reargument, and the following questions are suggested for discussion:

1. The opinion rendered herein is based on the assumption that the cause of action upon which judgment was rendered never vested in the deceased and did not survive. This appears to have been an erroneous assumption, and the appellant contends that the logic of the opinion does not apply to a situation where the cause of action vested in the deceased and survived. We have not had the benefit of re-

spondent's views on this question and we desire an expression of his opinion thereon.

2. Was there in fact reversible error in the trial proceedings resulting in the judgment against *Herman Miller,* which was reversed in 169 Wis. 106?

3. Upon that appeal the judgment was reversed and the cause remanded for further proceedings according to law. Did the judgment of the trial court dismissing the complaint as to *Herman Miller,* from which judgment this appeal is taken, under the circumstances constitute further proceedings according to law in conformity with that mandate? If not, what course should the trial court have followed in obedience to the mandate? At that time did the *Miller Scrap Iron Company* have such an interest in the cause of action set forth in the complaint as to entitle it to be heard in opposition to the motion to dismiss as to *Herman Miller?*

4. Upon this appeal, has this court power or jurisdiction to modify its former mandate by directing that judgment be entered in favor of the *Miller Scrap Iron Company* and against *Herman Miller,* or in any other manner? Does the record disclose that the *Miller Scrap Iron Company,* or the casualty company, succeeded to the rights of the plaintiff in the cause of action set forth in the complaint?

5. Any other questions that may occur to counsel.

The cause was reargued on December 16, 1921, and the following opinions were filed April 11, 1922:

OWEN, J. (*on rehearing*). The foregoing opinion proceeded on the assumption that the cause of action upon which recovery was obtained was founded upon the death statute of the state of Michigan. Upon a motion for rehearing our attention was called to the fact that the original complaint set forth two causes of action, one based on the death statute and the other on the survival act of the state of Michigan, by virtue of which a cause of action to

recover damages for personal injuries survived and vested in the personal representatives of the deceased, and that during the course of the trial the cause of action founded on the death statute of the state of Michigan was dismissed, and only the survived cause of action was submitted to the jury. It was urged upon such motion that the logic of the opinion did not apply to such survived cause of action, because it had vested in the deceased prior to his death. It appearing that this might be true, a rehearing was granted and the question thus raised was fully argued.

It appears that the death statute of the state of Michigan gives rise to a cause of action in favor of the personal representatives of a deceased person who has come to his death by the wrongful act of another only when there is no substantial interval between the accident or wrongful act and the death. Where there is any substantial interval a cause of action vests in the injured person, which upon his death survives and vests in his personal representatives. Under the decisions of the Michigan supreme court the measure of damages in such survived action includes "loss of earning ability of the injured person for the length of time that he probably would have lived had he not been injured and the loss sustained by reason of being deprived by such injury of the ability to labor and earn money during the time he probably would have lived had he not been injured." *Olivier v. Houghton Co. St. R. Co.* 134 Mich. 367, 96 N. W. 434.

In this case Boncher lived about five weeks after the injury, so that there was a substantial interval between the accident and his death. Consequently a cause of action vested in him prior to his death, which survived and vested in his personal representatives. But unlike the cause of action which survives under the statutes of this state, it was competent for his administrator to recover not only for the damage sustained by him up to the time of his death,

but for the loss of earnings during the time he probably would have lived had he not been injured. The practical effect of this ruling by the supreme court of the state of Michigan is to dispense with two causes of action and to make all damages recoverable in one cause of action, whether death be instantaneous or not.

The fact is, however, that this accident occurred in the state of Michigan. The rights and liabilities of the parties are fixed by the law of the state of Michigan. *Bain v. N. P. R. Co.* 120 Wis. 412, 98 N. W. 241. The cause of action is based on the law of the state of Michigan. The law of that state was proved upon the trial, and the jury were authorized to assess damages conformably to the law of that state. The only difference, therefore, between the cause of action upon which recovery was obtained and the cause of action assumed in the opinion is that this cause of action did vest in Boncher prior to his death. While what was said in the opinion to the effect that a transition of the title to the cause of action from Boncher to any one else "cannot be attributed to any act of Boncher during his lifetime, because, as already pointed out, he had no title thereto and was impotent to convey title to any one else," is not applicable to the cause of action with which we are dealing, it by no means follows that the cause of action was assigned by Boncher to any one else. There is no claim that he attempted to assign it during his lifetime. Neither did he make application for compensation during his lifetime. Had he made such application it probably would have worked an assignment of his cause of action against *Herman Miller* to his employer, under the provisions of sec. 2394—25, Stats. But he did not do so, consequently no assignment of the cause of action can be attributed to any act of his. It should be noted that no assignment of such a cause of action takes place under the compensation act until application is made for compensation under the act.

Upon his death the cause of action vested in his personal representatives, by force of the Michigan survival statute. It was a different cause of action from that which would have vested in the personal representatives of the deceased under and by virtue of the statutes of this state had the accident occurred in this state. The action which survives under our statutes is an action for the damages which he had sustained up to the time of his death. The action which survived and vested in his personal representatives by virtue of the Michigan statute was an action to recover damages, including his loss of earning power, during the time he might probably have lived.

There is no room, therefore, for saying that the cause of action set forth in the complaint, upon which recovery was obtained, is not founded upon the Michigan statute. It is a cause of action which vested in the plaintiff administratrix under and by virtue of the Michigan law, not for the benefit of the widow, but for the benefit of those who would take the intestate personal property of the deceased. Sec. 14578, Compiled Laws of Michigan, 1915. It is beyond the power of the legislature of this state to divert this action from the plaintiff administratrix. While, as stated in the opinion, this may be done with reference to a cause of action created by the statutes of this state, because such a cause of action is at all times under the control of the legislature of this state, to attribute power to our legislature to thus interfere with a cause of action springing from the statutes of another state is to accord to the enactments of the legislature of this state extraterritorial effect. It is beyond the power of the legislature of this state to provide that one person can assign a cause of action which belongs to another, or that any act on the part of one shall operate as an assignment of a cause of action arising under the laws of a sister state, and which the statutes of that state vest in another. We adhere to the conclusion announced in the original opinion.

ESCHWEILER, J. (*dissenting*). One Joseph Boncher, a resident of Wisconsin, was employed by the defendant company, a Wisconsin corporation. They were both subject to the workmen's compensation act. On June 30, 1917, in the course of his employment, but while in the state of Michigan, Boncher was fatally injured through the overturning of an automobile driven by defendant *Herman Miller,* secretary and agent of the defendant company. On the death of Boncher shortly after the accident the plaintiff was appointed his administratrix in Brown county, Wisconsin. She brought this action in the municipal court of Brown county to recover damages against both the employer and *Herman Miller* for negligence, asserting her right upon certain Michigan statutes.

The defendant company asserted as a defense that any and all remedies on account of the injury to and death of the employee, Joseph Boncher, were for compensation under the Wisconsin compensation act and nowhere else.

Upon special verdict the jury found that there was negligence by the defendant *Herman Miller,* the agent of the defendant company, resulting proximately in the injury to and consequent death of Boncher, and assessed damages of $4,000. Upon appeal here the judgment entered against both defendants was reversed. The judgment as to the defendant *Herman Miller* was reversed at plaintiff's request.

Thereupon the widow of deceased brought proceedings before the industrial commission for an award of damages on account of the death of her husband. Such an award of $3,000 against the *Miller Scrap Iron Company* and the Georgia Casualty Company was made in September, 1919, and confirmed here. 173 Wis. 257, 180 N. W. 826.

Prior to the award by the industrial commission this action was dismissed in the court below as to the *Miller Scrap Iron Company* without any objection. It was also dismissed as to the defendant *Herman Miller* over the objec-

tion of the plaintiff and the *Miller Scrap Iron Company*. That company then appealed from such order to this court and a decision rendered herein on May 3, 1921. A motion for a rehearing was then made on behalf of the *Miller Scrap Iron Company,* upon which an opinion is now filed by the majority.

The decision now made on this motion for a rehearing is in effect that the rights and liabilities of the personal representative of Joseph Boncher, being the plaintiff administratrix; of the defendant employer, which has already been required to pay full compensation for the injury arising from the accident to and death of Joseph Boncher; of its insurance carrier; and of *Herman Miller,* the agent of the defendant company, through whose negligence it was claimed the injury occurred, are now to be governed and controlled by the laws of Michigan rather than by the laws of Wisconsin. That is not only the effect of the present ruling, but its express language so states: "The rights and liabilities of the parties are fixed by the law of the state of Michigan. *Bain v. N. P. R. Co.* 120 Wis. 412, 98 N. W. 241." And again: "The cause of action is based on the law of the state of Michigan." It is also held that the defendant company, the employer, has no right of subrogation to the tort cause of action, if any such there be, against *Herman Miller.* There is no question but that if the law of Wisconsin governs, there must be subrogation or assignment of such possible tort action by the express language of sec. 2394—25, Stats., which reads, so far as material, as follows:

"The making of a lawful claim against an employer or compensation insurer for compensation under sections 2394—3 to 2394—31, inclusive, for the injury or death of an employee shall operate as an assignment of any cause of action in tort which the employee or his personal representative may have against any other party for such injury or death; and such employer or insurer may enforce in their

own name or names the liability of such other party for their benefit as their interests may appear. If a recovery shall be had against such other party, by suit or otherwise, the compensation beneficiary or beneficiaries shall be entitled to any amount recovered over and above the amount that the employer or insurer, or both, have paid or are liable for in compensation to such beneficiary or beneficiaries, after deducting reasonable cost of collection, and in no event shall the beneficiary receive less than one third the amount recovered from the third party, less the reasonable cost of collection."

On the first appeal it was held (169 Wis. 106, 170 N. W. 275, 171 N. W. 935): 1st. That the contract of employment received a statutory inflexibility; 2d, that such statutory contract governed the rights and liabilities of the personal representative of the employee as well as of employer and employee; 3d, that such contract and such control over the rights and liabilities of the parties is extraterritorial. It was said as follows:

"The liability of the employer under the act being statutory, the act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is a part of every contract." Page 115.

Also:

"The right of the employee to recover the compensation provided for by the act is exclusive of all other remedies against the employer for any injury which the employee may sustain, *and in the event of his death the same limitation applies to his personal representatives.*" Page 115.

Again:

"The contract of employment was made within this state and the action is brought in the courts of this state, and the *question is whether or not in this case the rights and liabilities of the parties should be determined in accordance with the workmen's compensation act or in accordance with the law of the state of Michigan, where the injuries occurred.*" Page 116.

And also:

"The workmen's compensation act of Wisconsin is so far a part of every contract of employment that the rights and liabilities of the parties thereto in case of injury to the employee, both being subject to it, must be determined in accordance with its provisions, *whether such injuries occur within or without the state.* The act is controlling as to the rights and liabilities of the parties to the contract wherever the contract of employment is valid. The statutory liability of the employer is exclusive of all other liability of the employer where both parties are under the act." Page 118.

It resulted in a holding that the personal representative, plaintiff here, could not enforce a judgment in tort for $4,000 damages which she had obtained under the Michigan statutes against the employer, for the negligence of its servant. It also held that, in lieu of such judgment, the only right that existed for this plaintiff as personal representative of the deceased was for compensation under the Wisconsin statute whereby the widow received but $3,000 in lieu of the $4,000.

Since that case has been decided the supreme court of Michigan reached exactly the same conclusion as to their compensation act in a proceeding where a widow claimed compensation under a Michigan contract of employment on account of the death of her husband in the state of Illinois. *Crane v. Leonard, Crossette & Riley*, 214 Mich. 218, 183 N. W. 204, quoting at length from our former opinion herein (169 Wis. 106, 170 N. W. 275, 171 N. W. 935). It is a fair presumption that the courts of Michigan would recognize fully the contractual rights and liabilities of the respective parties herein, as they are bound by the statutory contracts of our workmen's compensation act in any proceedings instituted in that state.

The present holding and that on the first appeal are not merely inconsistent but absolutely contradictory. The holding in the first appeal became the law of this case (*Pulp Wood Co. v. Green Bay P. & F. Co.* 168 Wis. 400, 404, 170

N. W. 230), and must control even if subsequent consideration should convince us that the first holding was wrong. *Legault v. Malacker,* 166 Wis. 58, 60, 163 N. W. 476; *Jeffery v. Osborne,* 145 Wis. 351, 359, 129 N. W. 931; *Roach v. Sanborn L. Co.* 140 Wis. 435, 438, 122 N. W. 1020; *Strehlau v. John Schroeder L. Co.* 152 Wis. 589, 592, 142 N. W. 120; *John v. Pierce, ante,* p. 220, 186 N. W. 600.

Being firmly convinced that the first ruling was correct and should be adhered to and is in line with the authorities elsewhere and particularly in Michigan, where the cause of action for the tort arose, I think it should now be consistently followed and the subrogation feature of the workmen's compensation act of Wisconsin be given effect as fully as was the exclusive remedy to damages.

If the present holding is right, then the first decision was wrong, whereby we took away from the personal representative a $4,000 judgment obtained under the Michigan statute for a tort and compelled the dependents of the deceased to be satisfied with a $3,000 award under the Wisconsin statutes.

Again, if a Wisconsin court has no power to compel a Wisconsin personal representative of a deceased Wisconsin citizen to assign to a Wisconsin employer a cause of action which was awarded in a Wisconsin court, the master having paid compensation to a Wisconsin widow for the same death, then this court has no right to take away from the personal representative the judgment first obtained.

If it be now intended to hold that double compensation for this identical injury and consequent death is to be permitted because the injury arose in Michigan, then surely we had no right to take away the first judgment. Again, if double compensation be now permitted whereby dependents of the injured employee may claim compensation under the Wisconsin statute and also recover and keep damages for the same injury and death against some one causing such injury outside of the state of Wisconsin, then

manifestly there is an unfair discrimination, in that the Wisconsin employer whose employee is injured in another state has no right, although having paid full compensation, as measured by our statute, for the injury or death, to recover against the wrongdoer, while if the accident happens in Wisconsin he has such right.

If the court had power in the first instance to lay its restraining hand on the personal representative as to her enforcing this judgment, I can see no grounds upon which it could be properly held it must now stay its hand in carrying out another provision of the same compensation act.

For these reasons I cannot agree with what is said in the majority opinion.

DOERFLER, J., took no part.

IN RE CARLSON. [Habeas corpus.]

December 16, 1921—April 11, 1922.

Criminal law: Murder: Aiders and abettors: Indictment or information: Certainty: Sufficiency: Necessity of words "malice aforethought" or equivalent: Jurisdiction of court if no crime stated: Plea of guilty to information not charging murder: Validity of sentence: Review: Habeas corpus not remedy: Procedure upon plea of guilty.

1. In this state murder is recognized, treated, and punished as an offense by the common law, of which the statute is merely declaratory.
2. Under secs. 4613 and 4614, Stats., one aiding or abetting another in the commission of a felony is guilty as a principal.
3. The word "wilful" in an information does not supply the necessary element of premeditation required to charge murder in the first degree, the words "malice aforethought" being required by the statute as well as by the common law.
4. Under sec. 7, art. I, Const., the accused is entitled to know with what he is charged; and not only must all the facts and circumstances which constitute the offense be stated in the indictment or information, but they must be stated with such

certainty and precision that the defendant may be able to judge whether they constitute an indictable offense, in order that he may demur or plead and prepare his defense and be able to plead the conviction or acquittal in bar of another prosecution.

5. Jurisdiction to try and punish for crime cannot be acquired otherwise than in the mode prescribed by law; and where the complaint, indictment, or information is invalid, the court is without jurisdiction.
6. The information in this case, charging the accused with unlawfully and feloniously aiding another in committing the felonious and wilful murder of deceased, being insufficient to charge murder in the first degree, does not include and charge murder in the second and third degrees where it contains no apt language charging such lower degrees.
7. Although sec. 4660, Stats., provides that in indictments or informations for manslaughter it shall be sufficient to charge that the accused did feloniously kill and slay the deceased, an information may be good though it does not use the language of that section; and an allegation that the petitioner aided another in wilfully and feloniously murdering the deceased, which includes every element in the statutory language, charges the defendant with first-degree manslaughter.
8. An accessory before the fact must be prosecuted as such; but one present aiding and abetting in the commission of a felony may be convicted as a principal although only guilty of assisting in committing the offense.
9. Where an information charges an offense, the court, having jurisdiction of the defendant and the subject matter, could proceed; but where it failed to charge the commission of murder in the first degree, the judgment of conviction thereof upon the defendant's plea of guilty was clearly erroneous.
10. Under such circumstances a judgment of conviction of first-degree murder upon a plea of guilty which was erroneous, but not beyond or without the court's jurisdiction, cannot be reached in a proceeding in *habeas corpus.*
11. Where the information did not charge murder in the first degree, but defendant was convicted thereof upon a plea of guilty, he was entitled to a review by writ of error under sec. 21, art. I, Const.; and if, by reason of his neglect or want of knowledge as to his rights, the defendant has been unjustly punished, he may appeal to the governor of the state, who could relieve from unjust or excessive punishment, under sec. 6, art. V, Const.; but the merits of the case cannot be reviewed by *habeas corpus.*
12. The right of the accused to be heard as to whether he has anything to say why sentence should not be pronounced against him is not a mere formality.

13. In accepting a plea of guilty under sec. 4712, Stats., and awarding a sentence thereon, where the information charges an offense which includes others the court should adjudge the defendant guilty, stating the offense, though this may not be technically necessary.

BY A WRIT of *habeas corpus* issued out of this court on the 30th day of November, 1921, the warden of the state prison at Waupun was required to bring the petitioner, *Carl O. Carlson,* before this court on the 16th day of December, 1921, and to show the time and cause of the imprisonment of the said *Carl O. Carlson.* In response to the writ Warden R. M. Coles produced the prisoner and alleged that he held the prisoner in custody by virtue of a certain commitment issued by Benjamin M. De Diemar, clerk of the circuit court for Kenosha county, on the 8th day of December, A. D. 1919, by which he was commanded to take and hold the body of said *Carl O. Carlson* and him safely confine at hard labor in the state prison at Waupun, Wisconsin, pursuant to a judgment of sentence and conviction rendered in and by the circuit court for the county of Kenosha, in the state of Wisconsin, on the 8th day of December, A. D. 1919. Attached to the writ was a certified copy of the minutes of the clerk of the circuit court at Kenosha county, as follows:

"Court opens Monday, December 8, 1919, at 10 a. m.
"Present: Hon. W. B. QUINLAN, Judge, presiding.
"Reporter, J. M. Carney.
"Clerk, Benj. M. De Diemar.
"Officer, Alex Ritter.

"State of Wisconsin vs. "Carl O. Carlson.	State of Wisconsin represented by Peter Fisher, Jr., District Attorney.
	Defendant in court in person and in custody.
	Defendant *Carl O. Carlson* arraigned and information read to defendant, to which he pleads 'Guilty.'

"The court pronounces the following sentence:

"It is the judgment and sentence of the court that you, *Carl O. Carlson,* be punished by confinement at hard labor

in the state prison at Waupun, Wisconsin, for and during the remainder of your natural life, beginning at noon today, the first day of each year of such confinement to be solitary."

From the petition it appears that the information upon which the plea of guilty was entered is as follows:

"I, Peter Fisher, Jr., district attorney for Kenosha county, state of Wisconsin, do hereby inform the court that on the 31st day of March, A. D. 1919, at the city and county of Kenosha, Wisconsin, *Carl O. Carlson,* defendant, did unlawfully and feloniously aid one Earl Loveday in the commission of an offense which under the laws of the state of Wisconsin is a felony, to wit, the felonious and wilful murder of one Antonio Pingitore by the said Earl Loveday by counseling and being in company with the said Earl Loveday in the commission of such felony, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Wisconsin."

It further appears from the petition and the return that upon the judgment and sentence of the circuit court a commitment was issued in due form; that the petitioner was conveyed to the state prison at Waupun and committed to the custody of the warden of the state prison at Waupun, and that he was detained in said prison under and by virtue of said commitment. Upon the return being made the petitioner demurred to the return, oral argument was had, and briefs filed.

John W. Wegner and *F. J. Walthers,* both of Milwaukee, for the petitioner.

On behalf of the Warden of the State Prison there were briefs by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, *M. E. Walker,* special prosecutor for Kenosha county, and *Frank M. Symmonds,* district attorney of Kenosha county, and oral argument by *Mr. Messerschmidt* and *Mr. Symmonds.*

On December 28, 1921, the court directed that further briefs be filed upon the following propositions:

First. Assuming that the information does not charge the defendant with aiding in the commission of the crime

of murder in any degree, does it charge the defendant with the crime of aiding in the commission of manslaughter, and, if so, in what degree?

Second. Assuming that the information charges the defendant with aiding in the commission of some degree of manslaughter, is the sentence imposed merely excessive or is it a sentence imposed for a different offense?

Third. Did the failure of the court to specifically find the defendant guilty upon his plea of guilty deprive the court of jurisdiction to impose a sentence conclusive as to legality and justice under the provisions of sec. 3428, Stats.?

The following opinion was filed February 7, 1922:

ROSENBERRY, J. The petitioner alleges that the commitment is void and assigns four grounds upon which the allegation is based:

First. Because the information does not charge the defendant with first-degree murder as defined by our statute.

Second. That the plea of guilty does not supply nor cure this defect.

Third. That the court has no jurisdiction of the premises to pronounce sentence as it did under the information.

Fourth. That the court had no jurisdiction in the premises.

We shall first consider whether the information charges *Carl O. Carlson* with murder in the first degree, for if he aided and abetted another in the commission of the offense charged, under our law he is guilty as a principal. Secs. 4613 and 4614, Stats.

Sec. 4660, Stats. "In indictments or informations for murder or manslaughter it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment or information for murder to charge that the accused did wilfully, feloniously and of his malice aforethought kill

and murder the deceased; and in any indictment or information for manslaughter it shall be sufficient to charge that the accused did feloniously kill and slay the deceased."

The language used in the information is "the felonious and wilful murder of one Antonio Pingitore." The question presented is, Are the words "the felonious and wilful murder" equivalent to the language of sec. 4660, which requires the information to charge that the accused "did wilfully, feloniously and of his malice aforethought kill and murder" Antonio Pingitore? Prior to 1531 there was in England only one form of felonious homicide, being that now known as manslaughter. In this was included the malicious killing, since termed murder. By the statute of 23 Henry VIII, c. 1, par. 3, there was taken from those who committed wilfully and of malice aforethought benefit of clergy, and to this offense the name of murder was subsequently given, and upon this statute the distinction between murder and manslaughter has ever since rested, both in England and in this country. 3 Bishop, New Crim. Proc. (2d ed.) p. 1527. Thereafter in indictments the phrase "wilfully and of malice aforethought" was used to distinguish indictments for murder from those for manslaughter, "for," says Hawkins, "unless these words appear the offender was entitled to benefit of clergy. In other words, the charge was only manslaughter." 2 Hawkins, P. C. c. 33, sec. 25. While in the statute of 23 Henry VIII the word "wilfully" appears with the words "and of malice aforethought," in the subsequent statute, 1 Edward VI, c. 12, par. 10, which is a re-enactment of the statute of Henry VIII, the word "wilfully" was omitted for the reason that it was included within the term "malice aforethought." It has been held in a large number of cases that the words "malice aforethought," or their equivalent, are indispensable to an information or indictment charging murder in the first degree. 3 Bishop, New Crim. Proc. (2d ed.) p. 1552, and

cases there cited. See *Nicholson's Case,* 1 East, P. C. 346; *Etheridge v. State,* 141 Ala. 29, 37 South. 337; *Comm. v. Davis,* 11 Pick. 432; *Comm. v. Webster,* 5 Cush. 295, 52 Am. Dec. 711; *Comm. v. Chapman,* 11 Cush. 422; *State v. Brown,* 168 Mo. 449, 68 S. W. 568; *State v. Woodward,* 191 Mo. 617, 90 S. W. 90.

In this state murder is recognized, treated, and punished as an offense by the common law of which the statute is merely declaratory. *Hogan v. State,* 30 Wis. 428, at p. 435; *Pliemling v. State,* 46 Wis. 516 (1 N. W. 278) at p. 519.

In *State v. Fee,* 19 Wis. 562, it was held that in indictments for murder it must be stated that the defendant feloniously, of his malice aforethought, did kill and murder deceased, for without the terms "malice aforethought" and the artificial phrase "murder" the indictments will be taken to charge manslaughter only. Under some statutes the words "of malice aforethought," or their equivalent, have been dispensed with. *Johnson v. People,* 33 Colo. 224, 80 Pac. 133; *Williams v. State,* 45 Fla. 128, 34 South. 279; *Lindsey v. State,* 69 Ohio St. 215, 69 N. E. 126; *State v. Johnny Tommy,* 19 Wash. 270, 53 Pac. 157.

In *Allen v. State,* 85 Wis. 22, 54 N. W. 999, the word "wilfully" appears to have been omitted from the information in the case. The court says:

> "This is one of the few technical words which the statute (sec. 4660, R. S.) retains, and seems to indicate as necessary in an information for murder. What effect this omission might have even were the verdict complete, was not discussed and is not necessary to be decided, but we deem it proper to call attention to the omission."

By ch. 137 of the Laws of 1871 (now sec. 4669, Stats.) it was held when the offense charged has been created by any statute or the punishment of such offense has been declared by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute if it describe the offense in the

words of the statute or in words of substantially the same meaning. It was held in *Kilkelly v. State,* 43 Wis. 604, that the act did not dispense with the necessity of averring in an indictment or information for murder that the accused did wilfully, feloniously, and of his malice aforethought kill and murder the deceased.

Wilfully, when used in the description of criminal acts, involves evil intent or legal malice (*Brown v. State,* 137 Wis. 543, 119 N. W. 338), as well as knowledge of the character of the act or intent to do it. It has not, however, been held that it includes the element of premeditation essential to charge murder in the first degree. The words "malice aforethought," or their equivalent, being by the statute as well as by the common law essential to an indictment or information for murder, we cannot, either upon reason or authority, hold that the use of the word "wilful" supplies the necessary element of premeditation, which must always be present in a valid information or indictment for murder in the first degree. While the conclusion reached by this court in *Hogan v. State,* 30 Wis. 428, that the words "of malice aforethought" are sufficient to charge the necessary element of premeditated design, may be subject to some criticism (3 Bishop, New Crim. Proc. (2d ed.) § 575), it is nevertheless the established law of this state, and in this opinion the words "malice aforethought" are used as including under our statute the element of premeditated design when used in discussing the sufficiency of an information under our law.

It is considered, therefore, that the information in this case did not charge the accused with aiding and abetting the commission of the crime of murder in the first degree. We must therefore consider whether or not it charged the defendant with aiding or abetting the commission of homicide in any degree, either of murder or manslaughter, for if the information charged no offense the court had no jurisdiction to proceed to judgment.

Sec. 7, art. I, of the constitution provides:

"In all criminal prosecutions the accused shall enjoy the right . . . to demand the nature and cause of the accusation against him."

"It is an elementary rule of criminal law that not only must all the facts and circumstances which constitute the offense be stated in an indictment, but they must be stated with such certainty and precision that the defendant may be enabled to judge whether they constitute an indictable offense or not, in order that he may demur or plead to the indictment accordingly, prepare his defense, and be able to plead the conviction or acquittal in bar of another prosecution for the same offense. And our bill of rights secures to the accused the right to 'demand the nature and cause of the accusation against him.'" *Fink v. Milwaukee,* 17 Wis. 26.

By art. V of the amendments to the constitution of the United States it is provided that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." It has been held that the indictment referred to is the presentation to the proper court, under oath, by a grand jury duly impaneled, of a charge describing an offense against the law for which the party may be punished. *Ex parte Bain,* 121 U. S. 1, 7 Sup. Ct. 781.

In *Ex parte Bain* the court says:

"Upon principles which may be considered to be well settled in this court, it can have no right to issue this writ [*habeas corpus*] as a means of reviewing the judgment of the circuit court, simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge."

The indictment was amended by striking out the words "the comptroller of the currency and." The court held that this amendment so affected the indictment that the indictment upon which he was tried, the amended indictment,

was not the indictment rendered by the grand jury. The court says:

"It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned." *Ex parte Bain,* 121 U. S. 1, 7 Sup. Ct. 781.

Art. V does not apply to state courts, but the decision is entitled to great weight; for while the language of our constitution and the constitution of the United States is different, the right guaranteed is the same in each, that is, the right of the accused to know with what crime he is charged.

Jurisdiction to try and punish for a crime cannot be acquired otherwise than in the mode prescribed by law. A formal accusation is essential for every trial of a crime. Without it the court acquires no jurisdiction to proceed, even with the consent of the parties, and where the indictment or information is invalid the court is without jurisdiction. 16 Corp. Jur. p. 176, § 230, and cases cited; 22 Cyc. 171, 172, and cases cited.

Language is used in *Petition of Semler,* 41 Wis. 517, which is not in harmony with the authorities referred to. In that case the petitioner was charged with the crime of embezzlement. An information was filed containing three counts. At a subsequent term the third count was *nolled* and the petitioner moved to quash the first two counts for the reason that they charged no offense. There was an examination, the petitioner was held to appear in the circuit court, and entered his recognizance with sufficient sureties.

The circuit court required additional bail, which the petitioner failed to furnish, and he was thereupon imprisoned. The petitioner claimed that his imprisonment was illegal in that the first and second counts of the information did not charge him with the commission of any offense. In this case this court declined to consider whether or not the information stated an offense. The court said:

"There can be no doubt that the circuit court had jurisdiction of the person of the petitioner, and of the offense charged in the information. But it is claimed that the first and second counts in the information charged no offense; in other words, that the information is insufficient, and that the motion to quash for that reason should be sustained. This may be at once conceded, but what follows? Manifestly this, that the circuit court gave a wrong decision where it clearly had jurisdiction, in holding a defective information good. The court committed an error, but there is no ground for saying it acted without jurisdiction in rendering its decision."

In *State ex rel. Durner v. Huegin,* 110 Wis. 189, 236, 85 N. W. 1046, the court held that whether or not the complaint charges an offense is a jurisdictional matter.

"While it is true that such writ [*habeas corpus*] never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and *whether the complaint charges any offense known to the law are jurisdictional matters.*"

We shall not discuss the matter further than to say that, in order to invoke the jurisdiction of the court, there must be before the court a complaint, information, or indictment which charges some offense known to the law.

The information is not sufficient to charge petitioner with aiding Earl Loveday in committing murder either in the second or third degree. Not being sufficient to charge

murder in the first degree, which, if properly charged, would include murder in the second and third degrees and the various degrees of manslaughter, it contains no apt language to charge the lower degrees of murder as defined by our statute.

While the language of sec. 4660, Stats., is that it shall be sufficient in any information for manslaughter to charge that the accused did feloniously kill and slay the deceased, it is well settled that an information may be good although it does not use the language of the statute. Sec. 4669, Stats. The allegation of the information is that the petitioner aided Earl Loveday in the felonious and wilful murder of Antonio Pingitore. It must be held, both upon reason and authority, that a charge that one did feloniously and wilfully murder another includes every element to be found in the statutory language "did feloniously kill and slay another." *State v. Fee,* 19 Wis. 562. The information therefore charges the petitioner with aiding in the commission of the crime of manslaughter in the first degree. At common law it was held that by reason of the nature of the offense there could be no deliberation or premeditation in manslaughter; there could, therefore, be no accessory before the fact (1 Hale, P. C. 616; *Adams v. State,* 65 Ind. 565), although there were exceptions to the rule. *Reg. v. Gaylor,* 7 Cox, C. C. 253. See, also, *People v. Newberry,* 20 Cal. 439; *Stipp v. State,* 11 Ind. 62; *State v. Bogue,* 52 Kan. 79, 34 Pac. 410. There is, however, a clear distinction between an accessory before the fact and one who aids and abets in the commission of an offense. In this state an accessory before the fact must still be prosecuted as such. *Karakutza v. State,* 163 Wis. 293, 156 N. W. 965. On the other hand, it is equally well settled that one who is present aiding and abetting in the commission of a felony may be informed against as a principal and convicted as a principal, although he may have been guilty only of assisting in the commission of the offense. *Vogel v. State,* 138 Wis. 315, 119 N. W.

190. Under sec. 4346, Stats., it is held that a participant in an affray who acted with others in committing an assault and battery upon the deceased may be guilty of manslaughter in the first degree even though he did not strike the fatal blow. *Hayes v. State,* 112 Wis. 304, 87 N. W. 1076.

The information in this case charges the commission of an offense, and the court having jurisdiction of the person of the defendant and jurisdiction of the subject matter had jurisdiction to proceed. Upon the petitioner's plea of guilty the court adjudged him guilty of murder in the first degree and sentenced him accordingly. The information not charging the petitioner with aiding and assisting in the commission of the crime of murder in the first degree, the judgment and sentence of the court was clearly erroneous. The question then arises, Was the act of the court within its jurisdiction? If it is merely erroneous and within the jurisdiction of the court, the question cannot be reached in a *habeas corpus* proceeding. The statutes of this state prescribe plainly what questions may be considered upon the return of a writ of *habeas corpus.*

"Sec. 3427. The court or judge must make a final order to remand the prisoner if it shall appear that he is retained in custody either:

"(1) . . .

"(2) By virtue of the final judgment or order of any competent court of civil or criminal jurisdiction or of any execution issued upon such judgment or order."

By sec. 3428 it is provided:

"But no such court or officer, on the return of any such writ, shall have power to inquire into the legality or justice of any judgment, order or execution specified in the next preceding section" (sec. 3427).

In *Petition of Semler,* 41 Wis. 517, the nature of the writ of *habeas corpus* and its office under our law was fully inquired into. It is there said:

"At the outset it may be observed that the principle is well

settled that a writ of *habeas corpus* does not have the scope, nor is it intended to perform the office, of a writ of error or appeal. This doctrine is almost elementary in the law. The writ, then, cannot be resorted to for the purpose of reviewing and correcting orders and judgments which are erroneous merely. It deals with more radical defects, which go to the jurisdiction of the court or officer, and which render the proceeding or judgment void. A distinction between a proceeding or judgment which is void, and one that is voidable only for error, is recognized in the cases, and must be observed. Says DIXON, C. J., in *Petition of Crandall,* 34 Wis. 177: 'It is conceded that for mere error, no matter how flagrant, the remedy is not by writ of *habeas corpus.* For error, the party imprisoned must prosecute his writ of error or *certiorari.* Nothing will be investigated on *habeas corpus* except jurisdictional defects, or illegality, as some courts and authors term it; by which is meant the want of any legal authority for the detention or imprisonment.' " See *In re Blair,* 4 Wis. 522; *In re O'Connor,* 6 Wis. 288; *In re Perry,* 30 Wis. 268.

The court has applied this fundamental principle of law in many cases. In *State ex rel. Welch v. Sloan,* 65 Wis. 647, 27 N. W. 616, it appears that the relator, Welch, was confined in the state prison at Waupun upon the final judgment of the circuit court for Calumet county, in a criminal action of *The State v. Welch,* upon an information for murder. It appears that the relator was arrested and pleaded not guilty to the information, and upon the trial the jury rendered a verdict by which they found the defendant "guilty of murder as charged in the information against him," and upon this verdict the court rendered judgment that the relator be imprisoned in the state prison at Waupun for his natural life. He sued out a writ of *habeas corpus* before the judge of the Thirteenth judicial circuit, and upon the hearing the circuit judge remanded the prisoner, and thereupon a writ of *certiorari* was issued out of this court to review the proceedings and order of the circuit judge upon the writ of *habeas corpus.* It was the contention of the relator that the circuit court for Calumet county

had no authority or jurisdiction to pronounce the judgment it did, and that consequently the judgment of the circuit court showed no lawful cause for the imprisonment of the relator. This contention was based upon two grounds: first, that the information in the action pending in Calumet county did not charge the relator with the crime of murder in the first degree, and therefore the court had no jurisdiction to pass a sentence punishing the relator for that crime; and second, if the information was sufficient to sustain a conviction for murder in the first degree, still the verdict of the jury did not find him guilty of that special crime and therefore there was no authority or jurisdiction in the court to pronounce the judgment it did in the case. The information was in the form prescribed by sec. 4660 and was held sufficient, that question being ruled by *Hogan v. State,* 30 Wis. 428.

In support of the second proposition it was argued that, the verdict being a general verdict, it was insufficient to authorize the court to pass sentence and judgment against the relator, and *Hogan v. State, supra,* was relied upon. This court said:

"The contention that it was error to pass sentence upon such verdict may be admitted for the purposes of this case, although it does not appear from the opinion or the record in this court that the form of the verdict in the *Hogan Case* was the same as in the case at bar. In the *Hogan Case* this court held that the judgment pronounced upon the verdict was erroneous, not that it was void, and the judgment was reversed, and a new trial ordered in the case.

"It is evident that the circuit court did not act without jurisdiction in pronouncing judgment upon the verdict rendered. It was the duty of the court, upon the receipt of the verdict, either to pass judgment thereon, or to set it aside and order a new trial, as was done by this court in the *Hogan Case,* and not to discharge the defendant from custody. Admit that the court erred in pronouncing judgment upon the verdict instead of setting the same aside, certainly the court in doing so had the power, and it was its duty, to

determine what should be done in the case then before it; and if the court erred in its determination it was simply an error arising in the progress of the case, and not an act beyond the power and jurisdiction of the court, as it must be to be taken advantage of upon a writ of *habeas corpus.*

"The defendant having been duly charged with the crime of murder in the first degree, and having been brought into the custody of the court, the court had full jurisdiction both of the subject matter of the action and of the person of the defendant, and, having rendered a judgment against the defendant which the law authorizes after trial and conviction, any errors of the court intervening before the sentence and judgment must be taken advantage of either by motion in the court where the trial is had, or upon writ of error or exceptions in the manner prescribed by the statutes. These facts appearing to the officer before whom the writ of *habeas corpus* is returnable, it is his duty to remand the prisoner, under the provisions of sub. 2, sec. 3427, R. S." *State ex rel. Welch v. Sloan,* 65 Wis. 647, 27 N. W. 616.

In *In re Graham,* 74 Wis. 450, 43 N. W. 148, the petitioners were charged with robbery, being armed with a dangerous weapon, and were convicted of the offense as charged. Graham was sentenced to imprisonment in the state prison for thirteen years and McDonald for fourteen years. The information was based upon sec. 4375, R. S., which provided that the guilty party "shall be punished by imprisonment in the state prison, not more than ten years, nor less than three years." The sentences being in excess of the period fixed by the statute, the petitioners applied for a writ upon that ground. The court said:

"We deny the writs for the reason that the error in the judgments does not render them void, or the imprisonment under them illegal, in that sense which entitles them to be discharged on a writ of *habeas corpus.* The judgments are doubtless erroneous, and would be reversed on writ of error. (Citing cases.) But the judgments are not void. ' *State ex rel. Welch v. Sloan,* 65 Wis. 647, 27 N. W. 616. The court had jurisdiction of the persons and subject matter or offense, but made a mistake in the judgment. For mere

error, no matter how flagrant, the remedy is not by *habeas corpus*. The law is well settled in this court that on *habeas corpus* only jurisdictional defects are inquired into. The writ does not raise questions of errors in law or irregularities in the proceedings."

This case was taken to the supreme court of the United States and affirmed in 138 U. S. 461, 11 Sup. Ct. 363. See, also, *Petition of Crandall,* 34 Wis. 177; *In re Roszcynialla,* 99 Wis. 535, 75 N. W. 167; also *Ex parte Tani* (29 Nev. 385, 91 Pac. 137), 13 L. R. A. N. S. 518, in which a large number of cases are reviewed. See, also, note, part 3, *In re Taylor,* 45 L. R. A. 136; *In re Cica* (18 New Mex. 452, 137 Pac. 598), 51 L. R. A. N. S. 373; also note L. R. A. 1916F, 967.

State ex rel. Welch v. Sloan, 65 Wis. 647, 27 N. W. 616, was expressly affirmed in *State ex rel. Dunn v. Noyes,* 87 Wis. 340, 58 N. W. 386, and also in *In re Shinski,* 125 Wis. 280, 104 N. W. 86. A distinction is made where a petitioner is held for trial by a committing magistrate and where the petitioner is detained in custody by virtue of the final order or judgment of a court having jurisdiction of the subject matter and the person. *State ex rel. Durner v. Huegin,* 110 Wis. 189 (85 N. W. 1046) at pp. 235–239. This distinction is based upon sec. 3408, Stats. *Arnold v. Schmidt,* 155 Wis. 55, 143 N. W. 1055. See, also, *In re Murphy,* 148 Wis. 292, 134 N. W. 823. Applying the law declared by these decisions, it is apparent in the instant case that when the information was filed charging the petitioner with homicide, it was within the jurisdiction of the circuit court, upon the petitioner entering a plea of guilty, to proceed to adjudge him guilty of murder in the first degree and sentence him accordingly, and while, as in the case of *Hogan v. State* and in the case of *State ex rel. Welch v. Sloan,* the conclusion reached by the circuit court was erroneous, it still was not beyond nor without its jurisdiction. Whether it be regarded, as in the *Semler Case,* 41 Wis. 517, as an erro-

neous conclusion, or be regarded as an excessive sentence, as in the case of *In re Graham,* 74 Wis. 450, 43 N. W. 148, it is in both aspects an error which the court committed within the exercise of its jurisdiction, and therefore under our statutes, which are merely declaratory of the common law, it is the duty of this court to remand the petitioner.

The petitioner in this case was not without remedy. The error would no doubt have been promptly corrected had it been called to the attention of the trial court, and failing that, there was open to the petitioner a review by writ of error, which, by sec. 21, art. I, of our constitution, shall never be prohibited by law. The merits of this case are not in any way before us for review. The record is silent as to the circumstances attending the commission of the crime with which the petitioner is charged. If by reason of his neglect, or want of knowledge as to his rights, the petitioner has been unjustly punished, or his punishment is, in view of all the circumstances, excessive, sec. 6 of art. V has vested with the governor of this state the power to relieve the petitioner. It is only after a long and exhaustive examination of the authorities, aided by briefs of counsel, that we are obliged to say that the information does not technically charge the petitioner with the offense for which he was sentenced.

Two matters appear from an examination of the record upon which we feel it our duty to comment, although they are not strictly within the issues presented by this proceeding. It does not appear from the record that the petitioner was asked before sentence whether he had anything to say why sentence should not be pronounced against him. This right of the accused to be heard before sentence is pronounced is not a mere formality. In this connection we call attention to the language of Mr. Chief Justice GIBSON in *Hamilton v. Comm.* 16 Pa. St. 129:

"The forms of records are deeply seated in the foundations of the law; and as they conduce to safety and cer-

tainty, they surely ought not to be disregarded when the life of a human being is in question. Our practice of rotation has excluded experience from the county offices, and it would, perhaps, be profitable were the presiding judge to superintend the entries. It would at least prevent our judicial records from becoming entirely barbarous." See, also, *Ball v. U. S.* 140 U. S. 118, 130, 11 Sup. Ct. 761; *French v. State,* 85 Wis. 400, 55 N. W. 566.

The record does not show that the court, upon the plea of guilty being entered, found the defendant guilty of any specific offense. The proceedings in this case were evidently had under the provisions of sec. 4712, Stats., which provides that, upon the filing of an application therefor, the court may receive and record a plea of guilty and award sentence thereon. It does not require a formal finding. However, in a case like this, where the information filed charges an offense which includes others, good practice would indicate that there should be a finding, although it may not be technically necessary. Where an information charges an accused with murder in the first degree, and upon which he may be convicted of any degree of murder or manslaughter, and there is a general finding of the jury, as in the case of *Hogan v. State,* 30 Wis. 428, it is insufficient. It is necessary for the jury to find by their verdict the specific offense of which the defendant is guilty; otherwise the verdict is erroneous. We see no reason why the same principle should not apply to a plea of guilty to an information charging the same offense. So far as we are advised, it is the usual and customary practice of trial judges, upon the rendition of the verdict or the entering of a plea of guilty, to adjudge thereon that the defendant is guilty, stating the offense, and proceed thereupon to declare the sentence. While it may not be error to depart from this practice, it certainly makes the record more definite and certain and leaves nothing to be implied.

The plea of guilty of the defendant and the sentence

imposed by the court, whether it be regarded as erroneous because excessive, or as the result of an erroneous conclusion that the information charged the crime of murder in the first degree, constitutes a final judgment within the contemplation of the last paragraph of sec. 3428, and this court is required, therefore, under the provisions of sec. 3427, to remand the prisoner.

By the Court.—The demurrer to the return is overruled, and the prisoner is remanded to the custody of the warden of the state prison at Waupun.

ESCHWEILER, J., dissents.

A motion for a rehearing was denied, without costs, on April 11, 1922.

BRICKELL, Respondent, vs. TRECKER, Appellant.

January 10—April 11, 1922.

Automobiles: Injuries to pedestrians: Negligence: Pedestrian and driver each failing to see the other: Liability.

1. Pedestrians cannot heedlessly cross busy city streets, where automobiles and other traffic pass to and fro, without taking the least precaution to discover and avoid approaching vehicles.
2. A pedestrian struck while crossing a street by defendant's automobile, which she did not see until it was within five feet of her, cannot recover damages, since, if the defendant was negligent in not discovering plaintiff before she did, plaintiff was also guilty in not discovering defendant's automobile before it was so close to her.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Reversed.*

Twelfth street in the city of Milwaukee runs north and south. Cedar street runs east and west. On the 30th day of

March, 1920, plaintiff was walking south on Twelfth street from the northwest corner of the intersection. While she was crossing Cedar street she was struck by defendant's electric automobile, which was running east on Cedar street, inflicting personal injuries. This action was brought to recover the damages sustained by her. The jury found that the defendant was negligent and the plaintiff was free from negligence, and the court rendered judgment in favor of the plaintiff. The defendant appealed.

For the appellant there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Walter D. Corrigan.*

For the respondent there was a brief by *Bottum, Hudnall, Lecher & McNamara* of Milwaukee, and oral argument by *Geo. B. Hudnall* and *Frank L. McNamara.*

The following opinion was filed February 7, 1922:

OWEN, J. The evidence shows that the destination of plaintiff was two blocks south and two blocks west from the intersection of Twelfth and Cedar streets. She had safely crossed Twelfth street from the northeast corner to the northwest corner of the intersection, and paused momentarily on the northwest corner to consider whether she should proceed south or west from that point. She concluded to proceed south, and started across Cedar street, going south on Twelfth street. She was walking along the line commonly known as the crossing, which would be the sidewalk along the west side of Twelfth street, produced. The distance from curb to curb was thirty feet. She was struck by the left-hand fender of defendant's electric car while she was between the center line of Cedar street and the south curb. The exact point is not definitely fixed, but the testimony of both parties indicates that it was not far from midway between such center line and the south curb. Plaintiff's testimony fixes it at about eight feet from the south curb, while the testimony of the defendant makes it five or

six feet south of the center line of Cedar street. The parties, therefore, agree within two feet of where the collision took place.

Plaintiff testified that before she started across the street she saw some automobiles; she knew there were some around there, but she thought she had plenty of time to go across; she did not see any automobiles near her, and that in traveling from the north curb of Cedar street to the place where she was struck, no automobiles passed in front of her going either east or west on Cedar street. The plaintiff makes no claim that at any time she looked to the west to ascertain whether automobiles or other vehicles were approaching the intersection from that direction. Her testimony is that she looked south, in the direction in which she was going. She was asked this question: "Can you give us an idea how far this car was away from you when you first saw it there? Answer, No; when I looked up it seemed as though it was right on me; it was the first that I saw of it." The testimony of the plaintiff is to the effect that the car was about four or five feet from her when she discovered it. The defendant testified that she discovered the presence of the plaintiff when she (plaintiff) was four or five feet from the car, so that they discovered each other at about the same time.

Upon this state of facts the jury found the defendant negligent and exonerated the plaintiff from contributory negligence. It will be observed that the plaintiff had as good an opportunity to discover the defendant's car approaching from the west as the defendant had to discover the presence of the plaintiff upon the crosswalk. According to plaintiff's testimony, no automobile passed in front of her to obstruct her view to the west, from which direction defendant's car was approaching. She testified that her sight was good, and it is a physical certainty that if she had but glanced in the direction from which she was required to anticipate approaching traffic, after having passed the center of the street, she would have observed defendant's car in time to have

avoided the accident. Pedestrians cannot heedlessly cross busy city streets where automobiles and other traffic pass to and fro, without taking the least precaution to discover and avoid approaching vehicles. To grant such immunity to pedestrians is inconsistent with the existence of equal rights and privileges and mutual duties and responsibilities which under the law belong and attach to contemporary users of the streets. There is no reason for the conclusion that the defendant was under the responsibility of discovering plaintiff's presence upon the crosswalk and that plaintiff was under no duty to ascertain the presence of defendant's car. Speaking of a similar situation it was said in *Feyrer v. Durbrow*, 172 Wis. 71, 178 N. W. 306:

"The jury found that the boy was not negligent in not discovering the automobile before he did, and as he was in just as good a position to discover the automobile as the driver thereof was to discover the boy, how can it be said that the latter was negligent in failing to discover the boy before he did? According to the testimony of the boy the automobile was from two to seven feet away from him when he discovered it. According to the defendant the distance was ten or fifteen feet. The fact that the automobile was brought to a stop within three or four feet from the place where it struck the boy indicates that the driver must have acted with promptness and that the car must have been under good control. In no view of the evidence can we find any support for the verdict. The same considerations that acquit the plaintiff of negligence must also acquit the defendant."

This observation is applicable to the situation presented by this case. The finding that the defendant was negligent and that the plaintiff was free from negligence is arbitrary and unjustified by any reasonable construction of the evidence.

In reaching this conclusion we assume the negligence of the defendant. The jury found that the defendant failed "to exercise ordinary care in the management and control of the automobile immediately prior to plaintiff's injury." But in

what respect they found her negligent does not appear. The complaint charges that she was negligent in that she "failed to keep a proper lookout for pedestrians and that she was driving the said automobile at an excessive rate of speed under the circumstances, and that she did not have the said automobile under proper control, and that she failed to give a proper warning of her approach." It is not discoverable from the verdict in which one of the respects alleged the jury found the defendant negligent, or whether some thought she was negligent in one respect and some in another. This is a form of verdict that was condemned in *Matuschka v. Murphy*, 173 Wis. 484, 180 N. W. 821. However, the negligence of the defendant has no influence upon our conclusion. Upon any conceivable construction of the evidence, the plaintiff had ample and unobstructed opportunity to discover the defendant's car in time to have avoided the injury. She could have discovered the oncoming car as soon as the defendant could have discovered her. If the defendant was guilty of negligence in not discovering plaintiff before she did, the plaintiff was also guilty of negligence in not discovering the car of defendant before it was within five feet of her. From this conclusion we can see no escape.

By the Court.—Judgment reversed, and cause remanded with instructions to enter judgment dismissing plaintiff's complaint.

A motion for a rehearing was denied, with $25 costs, on April 11, 1922.

HEINTZ, Respondent, vs. SCHENCK, Appellant.

January 12—April 11, 1922.

Automobiles: Right of way at intersecting streets: Boulevards divided by parkway: Trial: Remarks of counsel: Qualifications of juror: View of premises: Nonprejudicial error: Excessive damages.

1. In an action for injuries sustained in a collision between two automobiles, remarks by both counsel in reference to an insurance company were not prejudicial, where the talk about such company seems to have originated with defendant's counsel, and it was not clear whether he was trying to tell the jury that plaintiff had indemnity insurance or whether plaintiff's counsel was trying to bring out the fact that defendant's counsel represented an insurance company; and the error, if any, was cured by the court's prompt direction that the jury disregard the remarks.
2. That a juryman who heard this action, on a later day, on his *voir dire* examination in another personal injury action, in answer to a question as to whether he would start out with any idea that "no matter whether there is no blame on anybody's part or not, if there was no blame on the plaintiff's part, they ought to get some money," stated "Why, yes; he is entitled to some money," did not show a disqualification, the question being indefinite and uncertain and it being doubtful what part he was attempting to answer. [The question whether a disqualification of a juror subsequently appearing might be ground for new trial, not passed upon.]
3. Under sec. 1636—49, Stats., giving to the driver of any vehicle the right of way at street intersections over vehicles approaching from the left, a car approaching from the south and reaching the south line of a boulevard, having driveways on both sides of a center park, before a car approaching from the east on the north driveway of such boulevard reached the east line of the intersecting avenue, did not have the right of way over such car, the intersection protected by the statute being that of the northerly part of the boulevard with the intersecting avenue.
4. In an action for injuries from a collision between two automobiles at a street intersection, an instruction that the jury had been taken out to view the scene of the accident because in the court's opinion such view was necessary to a just decision, and that if any witness testified to anything the jury knew, by the evidence of their senses, was false, they

might disregard his testimony, though no other witness testified to the fact as they knew it to be, was erroneous but not prejudicial, where, so far as applicable to any evidence, it may have been more favorable to defendant than to plaintiff.

5. Under secs. 2829 and 3072*m*, Stats., providing that no judgment shall be reversed for misdirection of the jury unless the court can say from an examination of the whole record that the error has affected appellant's substantial rights, it must appear affirmatively of record, with reasonable clearness, not only that the error was harmful, but that it was harmful in a material degree, since error will not be presumed, nor, where it appears, will it be presumed prejudicial.
6. The amount of damages being peculiarly a jury question, the court will set aside a verdict as excessive with reluctance, especially where it has been approved by the trial court.
7. A verdict of $8,000 to compensate plaintiff, a painting contractor sixty-two years of age, for injuries to his shoulder joint impairing his ability to work, for hospital and physician's bill of $144.20, and for repairs to his automobile amounting to $187.50, is considered excessive by $2,000.

APPEAL from a judgment of the circuit court for Milwaukee county: JOHN J. GREGORY, Circuit Judge. *Modified and affirmed.*

Personal injury. From the complaint it appears that Kenwood boulevard and Maryland avenue are public highways in the city of Milwaukee, Kenwood boulevard extending in an easterly and westerly direction and Maryland avenue in a northerly and southerly direction, intersecting each other at right angles; that on October 23, 1919, the plaintiff was driving a Ford truck along and upon Kenwood boulevard in a westerly direction and across the intersection of the boulevard with Maryland avenue, in a careful and prudent manner, and was upon the right side of the highway; that the defendant was driving his automobile in a northerly direction on Maryland avenue and across Kenwood boulevard at a negligent and reckless rate of speed, in violation of the laws of the state of Wisconsin, the rules of the road, and the ordinances of the city of Milwaukee; that the plaintiff's truck was struck by the defendant's automobile, due to the negligence of the defendant, and as a consequence the

plaintiff sustained serious and permanent injuries. The plaintiff was a painting contractor with an earning capacity of $300 per month. A second cause of action was stated as a basis for a claim of $500 damage to plaintiff's automobile.

By the answer the material allegations of the complaint were put in issue. The case was tried by the court and jury and the jury returned a special verdict by which it found that the defendant failed to exercise ordinary care in the management and control of his automobile at and immediately prior to plaintiff's injury; that such failure to exercise ordinary care was the proximate cause of plaintiff's injury; that the plaintiff was not guilty of contributory negligence; and assessed the plaintiff's damages at the sum of $8,000.

There were the usual motions after verdict. Sixty days after the rendition of the verdict having passed without the court having acted upon the motion for a new trial, it was denied and judgment was thereupon entered in favor of the plaintiff for $8,000 and costs. The court, however, at the request of the plaintiff, expressed the opinion that he would have denied the motion for a new trial, but would have reduced the damages to $5,000. From the judgment entered the defendant appeals.

For the appellant there was a brief signed by *Glicksman, Gold & Corrigan,* and oral argument by *Walter D. Corrigan* and *Robert Wild,* all of Milwaukee.

For the respondent there was a brief by *Dale C. Shockley,* attorney, and *Edgar P. Ettenheim* and *L. A. Schweichler,* of counsel, all of Milwaukee, and oral argument by *Mr. Shockley* and *Mr. Ettenheim.*

The following opinion was filed February 7, 1922:

ROSENBERRY, J. On behalf of the defendant it is contended that the verdict is contrary to all reasonable probabilities and should for that reason be set aside, and it is further contended that the plaintiff should be held guilty of

contributory negligence as a matter of law. We have carefully reviewed the evidence and are convinced that there is ample credible evidence to sustain the finding of the jury both as to the negligence of the defendant and as to the want of contributory negligence on the part of the plaintiff. We shall not set out or discuss the evidence in detail as no useful purpose will be served thereby.

The defendant further contends that a new trial should be granted because of improper remarks of plaintiff's counsel during the course of the trial. It appears that during the absence of the official reporter a colloquy between counsel took place, and upon the return of the reporter the following record was made:

"By Mr. Gold [attorney for defendant]: Now, Mr. Shockley [attorney for plaintiff] asked me whether I represented an insurance company and I told him 'No.'

"By Mr. Shockley: He made the statement first.

"By the Court: This is highly improper. The jury will disregard this. It has no place in this case.

"By Mr. Shockley: I submit that the statement made by counsel first—he ventured the remark—

"By the Court: I said this has nothing to do with the case. Neither one of you has any business talking about that feature. It has nothing to do with the case.

"By Mr. Gold: So that your honor and the jury will understand that I didn't say anything—counsel asked me whether I wanted to ask *Mr. Heintz* any more questions, and I said: 'Not until I get the statements from the Standard Accident Insurance Company.'

"By Mr. Shockley: He didn't say that. He said he wanted statements from the insurance company, and I said: 'Is that your insurance company?' and he said he didn't represent any insurance company. It is false.

"By Mr. Gold: I object to that.

"By the Court: The objection will be sustained. This is not an issue in this case, and counsel cannot make it an issue. This has nothing to do with this case, and the jury will disregard it."

This assignment is based upon *Chybowski v. Bucyrus Co.*

127 Wis. 332, 106 N. W. 833. We do not think this case comes within the principle of that case. The talk about an insurance company seems to have originated with counsel for defendant, and we are unable to determine from the record whether counsel for defendant was trying to tell the jury that the plaintiff had indemnity insurance or whether plaintiff's counsel was trying to bring out the fact that Mr. Gold represented an insurance company. Neither counsel for plaintiff nor defendant was justified in the course which he pursued. We are unable to discover any prejudicial error, and such error as there was, if any, was cured by the prompt and vigorous direction of the court to the jury that it should be disregarded.

It appears that several days after the verdict in this case was returned, Richard Genz, who was foreman of the jury, was examined by Mr. Gold, counsel for the defendant in this case, on his *voir dire* in another case. Upon this examination Mr. Genz was asked the following question:

"*Q.* Well, would you start out the case with any idea that no matter whether there is no blame on anybody's part or not—if there was no blame on the plaintiff's part, they ought to get some money?"

He replied:

"*A.* If there was no blame on the plaintiff's part?
"Mr. Gold: *Q.* Yes.
"Mr. Genz: *A.* Why, yes, he is entitled to some money."

Waiving the question whether or not a disqualification subsequently appearing might be urged as a ground for a new trial in a prior action, we are of the opinion that the question and answer do not show a disqualification in any case. The juryman might well have declined to answer the question because of its indefiniteness and uncertainty, but a juryman called in the rather embarrassing and unusual circumstances of being examined in open court would hardly take it upon himself to criticise questions propounded to

him, and no doubt he made the best answer of which he was capable. A great deal of speculation might be indulged in as to what was in fact in the juror's mind. If the juror was attempting to answer the latter part of the question, his reply would seem to indicate a clear understanding of the effect of the plaintiff's negligence upon his right to recover, but that is not a disqualification.

Kenwood boulevard is seventy-two feet wide between curbs and has a center park twenty-five feet in width. Each driveway is therefore twenty-three and one-half feet. Where Maryland avenue intersects Kenwood boulevard there is a width of eighty feet between the ends of the park spaces in Kenwood boulevard. Having in mind sec. 1636—49, Stats., the court instructed the jury as follows:

"At the intersection of any public street or highway with any other public street or highway of this state, the operator or driver of any vehicle shall have the right of way over the operator or driver of any other vehicle approaching him on such cross-street or highway from the left."

The jury were further instructed:

"The rights of travelers upon public streets, whether in automobiles or other vehicles or on foot, are mutual and co-ordinate, and it is the duty of each, in using the streets, to exercise ordinary care so as not to cause injury to another having an equal right."

The giving of this instruction is assigned as error for the reason that it is contended that the defendant reached the south line of Kenwood boulevard before the plaintiff reached the west line of Maryland avenue. Maryland avenue is thirty-five feet in width between curbs. The width of Maryland avenue is not to be confused with the ends of the parking place on Kenwood boulevard, which is, as has been stated, eighty feet. As we understand the defendant's contention, it is that a car approaching from the south on Maryland avenue and reaching the south line of Kenwood boulevard first would have the right of way over

a car moving west on Kenwood boulevard on the north driveway by reason of that fact. We do not think the statute should be so construed. The thing that is protected by the statute is the intersection. The line of travel moving westerly is on the north side of Kenwood boulevard, and the intersection that is protected is the intersection of the northerly part of Kenwood boulevard with Maryland avenue. In applying the statute, Kenwood boulevard is in practical effect two streets separated by a park.

Other errors are assigned with reference to the charge. Sentences are taken from their context and arguments based thereon which are not warranted when the charge is considered as a whole.

The court instructed the jury as follows:

"Now, gentlemen, you have been taken out to view the scene of this accident, and you have also been out to see the automobile that was driven by the plaintiff at the time of the accident, and the automobile that was driven by the defendant, for the reason that in the opinion of the court such view was necessary to a just decision.

"You are instructed that the view of the premises and the view of the automobiles, as made by you, was for the purpose of assisting you in weighing and applying the evidence in the case; and that, notwithstanding such view, you must, in deciding this case, be governed by all of the credible evidence in the case.

"If any witness produced upon the trial has testified to anything which you know by the evidence of your senses on the view to be false, you are not bound to believe the witness as to such fact, and you may disregard his testimony as to said fact, although no other witness has testified on the stand to the fact as you know it to be."

The defendant criticises the language used in the last paragraph and the statement in the first paragraph to the effect that the view was had "for the reason that in the opinion of the court such view was necessary to a just decision." The giving of this instruction was error under the ruling in *Haswell v. Reuter,* 171 Wis. 228, 177 N. W. 8, and cases

cited. Nothing appears of record to which the instruction was applicable unless it be the dispute as to the height of the bank on the south side of Kenwood boulevard, which, it was contended, obstructed the view of certain witnesses who claim to have seen the accident. If there are other circumstances to which the instruction might apply, they have not been called to our attention either in the brief or upon oral argument. So far as applicable to the dispute as to the height of the embankment and the obstruction of the view of the witnesses who testified for the plaintiff, the instruction may have been more favorable to the defendant than to the plaintiff. Under sec. 2829, Stats., as supplemented by sec. 3072*m*, no judgment shall be reversed for misdirection of the jury unless we are able to say from an examination of the whole record that the error complained of has affected the substantial rights of the party appealing. Error will not be presumed, nor where error appears will it be presumed to be prejudicial. It must appear affirmatively of record, with reasonable clearness, not only that the error was harmful, but that it was harmful in a material degree. *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179. We find nothing in this record upon which a conclusion that the substantial rights of the defendant have been materially adversely affected can be based.

The plaintiff was a painting contractor, sixty-two years of age, and had an expectancy, therefore, of something over twelve years. The hospital and physician's bill amounted to $144.20. The repairs to the Ford truck amounted to $187.50. In the adjustment of insurance, total disability was claimed for two months and twelve days and partial disability for one month and twenty-four days. It was the estimate of physicians that the plaintiff sustained a ten per cent. impairment of the use of his shoulder joint. He has lost some weight and the nature of his injuries no doubt limits his ability to handle his tools and to work with his hands above his head. He sustained a fracture of the collar

bone, which resulted in some shortening and affected the usefulness of the shoulder joint. The jury assessed the plaintiff's damages at $8,000, and the verdict is attacked here as being excessive. The amount of damages is peculiarly a jury question and the courts set aside verdicts as excessive with reluctance, especially where they have been approved by the trial court. The court is in this case, however, of the opinion that the verdict is excessive and should not have been for a greater sum than $6,000, and the judgment should be so modified.

By the Court.—The judgment appealed from is modified as stated in the opinion, and as so modified is affirmed, appellant to recover his costs in this court.

A motion for a rehearing was denied, with $25 costs, on April 11, 1922.

ESTATE OF HANREDDY.

January 13—April 11, 1922.

Executors and administrators: Claims against decedents: Ancillary and domiciliary administration: Assets wherever situate liable for claims: Nonresident creditors.

1. Where the entire assets of a deceased, though found in several jurisdictions, are insufficient to pay all obligations, there is such an interdependence between the various jurisdictions that the assets in their respective control will be considered as one fund, to be distributed *pro rata* to all creditors in the several jurisdictions by the several courts therein administering the affairs of the deceased, when the fact of insolvency is brought to the attention of the courts.
2. The manner in which the insolvency is brought to the attention of the court is immaterial.
3. The court having jurisdiction of ancillary administration, in so treating all the assets as one fund to be prorated to creditors in both jurisdictions may properly retain control of sufficient assets so that, when the proper percentage is ultimately de-

termined in the several jurisdictions, the creditors whose claims are filed and allowed in the jurisdiction of the domiciliary administration shall be paid their proper percentage.

4. Where the county court has ancillary jurisdiction in the administration of the estate of a decedent, it may properly pass upon and adjust the claims of nonresident creditors.

[5. The question whether a judgment obtained against the executrix in the state where domiciliary administration was pending could be considered a judgment such as might be certified to the county court under sec. 3846, Stats., or whether it was barred for failure to file the claim under sec. 3844, not determined.]

APPEALS from a judgment of the county court of Milwaukee county: M. S. SHERIDAN, Judge. *Reversed.*

One Joseph Hanreddy, a resident citizen of Chicago, Illinois, died there testate April 8, 1918. On June 25, 1918, his widow, Margaret Hanreddy, was duly appointed, qualified, and ever since has acted and is still acting as executrix of his estate in the probate court of Cook county, Illinois. Claims were therein filed aggregating more than $50,000. The available assets subject to that jurisdiction do not exceed $4,000.

In August, 1918, in the county court of Milwaukee county, Wisconsin, the will of said Joseph Hanreddy was duly probated and the said Margaret Hanreddy appointed executrix in ancillary proceedings, there being assets aggregating over $50,000 belonging to said estate as well as resident creditors within the state of Wisconsin. Claims have been filed therein by both resident and nonresident creditors in amounts in excess of the assets. Some creditors have filed their respective claims in both jurisdictions.

In August, 1919, the said executrix filed a petition in the county court of Milwaukee county reciting the probate proceedings in Illinois and in this state; the claims filed in the respective proceedings and their respective assets substantially as above set forth; the fact that the assets of the said estate are insufficient to pay all of the debts of the said estate and that the said estate is insolvent; that if all the claims filed

were allowed there would be assets in the Wisconsin jurisdiction sufficient to pay the claims filed in that jurisdiction to approximately ninety per cent. thereof, and that as to the claims in the Illinois jurisdiction the assets there would not be sufficient to pay more than a ten per cent. dividend thereon; that some of the claims filed were still being contested, and until final adjudication thereon the exact percentage of the total claims to the total assets could not be ascertained. She asked that no payment be made upon the claims filed in the Wisconsin jurisdiction until after final adjudication in both states upon all the claims and a determination had of the *pro rata* percentage that could properly be paid from the entire assets in both jurisdictions upon the respective claims in the several jurisdictions, and that after such ascertainment and payment upon such *pro rata* percentage of the claims filed and allowed in the Wisconsin jurisdiction the surplus should be turned over to her as executrix in the jurisdiction of Illinois, to be there likewise applied.

Petitions to the same effect were also filed on behalf of certain creditors who had theretofore filed their claims in the Illinois proceedings.

Prior to the death of Joseph Hanreddy the executors of the estate of one Julius W. Loewenthal brought suit against said Hanreddy in the superior court of Cook county, Illinois, to recover upon certain notes. Upon the death of Hanreddy the action was revived against Margaret Hanreddy as executrix, and on July 19, 1919, judgment was rendered against her for about $10,000. After the time for filing claims had expired in the Wisconsin jurisdiction the executors of the estate of said Julius W. Loewenthal joined in the petitions praying for a *pro rata* distribution of the entire assets and filed authenticated copies of the records and proceedings in connection with said judgment, and contended that the judgment so obtained and so certified should be considered as a claim against the estate of

said deceased in the ancillary administration in Wisconsin as coming under the provisions of sec. 3846, Stats.

Various objections to these several petitions and to the request of the Loewenthal executors were interposed by creditors whose claims had been filed herein. After a hearing the court made his findings of fact reciting substantially as above stated and his conclusions of law as follows:

"I. That the assets in said ancillary administration constitute a fund out of which the claims of creditors residing in Wisconsin, and who have duly filed their claims, be paid in full.

"II. That the claims of foreign creditors, residing outside of the state of Wisconsin, are disallowed in this ancillary administration.

"III. That this court has no jurisdiction to consider or allow claims of foreign creditors, and is confined in its administration, by virtue of the provisions of the statutes of the state of Wisconsin, to the consideration, determination, and payment of claims of Wisconsin creditors duly allowed in this jurisdiction and to the distribution of the assets in the ancillary administration for the benefit of Wisconsin creditors.

"IV. That any residue in the possession of the ancillary administrator after the payment of the claims of Wisconsin creditors duly allowed, and after the payment of the costs and expenses of the ancillary administration, are hereby ordered to be paid and delivered by said ancillary administrator to the executrix of the domiciliary estate."

An appeal was taken from the judgment or order entered in conformity with said conclusions of law as well as several applications made for review thereof under the provisions of sec. 3049*a*.

For the appellants *William J. O'Brien* and *Carey Brick Company* there was a brief by *Glicksman, Gold & Corrigan* of Milwaukee, and oral argument by *Raymond T. Jackson* of Mineral Point.

For the appellant *Maryland Casualty Company* there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and

Albert K. Stebbins, of counsel, all of Milwaukee, and oral argument by *Mr. Stebbins.*

For the respondent executors of the estate of Julius W. Loewenthal, deceased, there was a brief by *Benjamin Poss* of Milwaukee and *Rosenthal, Hammill & Wormser* of Chicago.

For the *Unity Safe Deposit Company, Southern Surety Company,* and *O. W. Huncke* there was a brief signed by *Quarles, Spence & Quarles* of Milwaukee, attorneys, and by *J. V. Quarles* and *H. T. Foulkes,* both of Milwaukee, and *Newman, Poppenhusen, Stern & Johnston* of Chicago, of counsel, and oral argument by *Mr. Foulkes* and *Mr. J. V. Quarles.*

A brief was also filed by *Hoyt, Bender & McIntyre* of Milwaukee, attorneys for *Christian Doerfler,* and *Olwell, Durant & Brady* of Milwaukee, attorneys for the *Western Lime & Cement Company,* and oral argument by *Arthur Snapper* and *Bernard V. Brady,* both of Milwaukee.

There was also a brief by *Robert N. McMynn,* attorney for the Wisconsin estate of Joseph Hanreddy, deceased, with *Harvey A. Malig,* of counsel, both of Milwaukee.

The following opinion was filed February 7, 1922:

ESCHWEILER, J. The questions presented on the appeals here are substantially these:

Administration of the estate of a deceased person being instituted in the state wherein was his domicile at the time of his death, and ancillary administration being had in a sister state where assets exist and creditors reside, and the combined assets in the two jurisdictions being insufficient to pay the total of the just claims allowed in the two jurisdictions, shall the assets in the respective jurisdictions be considered as one fund to be distributed *pro rata* to all the creditors in both jurisdictions of the estate of the deceased, or shall the funds in the ancillary administration be distributed to the resident claimants or claimants therein, the sur-

plus only, after paying such claimants in full, to be subject to distribution in the jurisdiction of the domicile?

Can the county court of this state, having but ancillary jurisdiction, consider and allow the claims of nonresident creditors?

In some respects ancillary and domiciliary administrations are entirely independent and separate proceedings; in other ways the ancillary, as its name implies, is subordinate or auxiliary to the primary administration at the domicile. As illustrative of their being independent, it may be noted that the time within which claims must be filed in order to be subject to allowance is fixed by the law of the place of administration and filing (*Davis v. Davis,* 137 Wis. 640, 647, 119 N. W. 334; *Fields v. Estate of Mundy,* 106 Wis. 383, 386, 82 N. W. 343; *Winter v. Winter,* 101 Wis. 494, 498, 77 N. W. 883); and again, a judgment against an administrator in one jurisdiction is not binding in the other. *Price v. Mace,* 47 Wis. 23, 26, 1 N. W. 336; *Brown v. Fletcher's Estate,* 210 U. S. 82, 94, 28 Sup. Ct. 702; *Ingersoll v. Coram,* 211 U. S. 335, 362, 29 Sup. Ct. 92; *Nash v. Benari,* 117 Me. 491, 105 Atl. 107, 3 A. L. R. 61, and note at p. 64, cited in Ruling Case Law, 2 Supp. p. 1249.

The broader scope of the domiciliary jurisdiction is well recognized in such cases as *Rackemann v. Taylor,* 204 Mass. 394, 403, 90 N. E. 552, to the effect that, though the court of ancillary jurisdiction has power to first probate a will, it should, in the absence of special circumstances, refuse to do so; and those holding that the final accounting is at the domicile. *Bedell v. Clark,* 171 Mich. 486, 137 N. W. 627. That the domicile is the primary jurisdiction has been recognized here (*Price v. Mace,* 47 Wis. 23, 27, 1 N. W. 336), the construction of the will being for the domicile rather than for the court of ancillary jurisdiction. *Will of Harker,* 172 Wis. 99, 102, 178 N. W. 246, and cases cited.

Where the assets of a deceased, though found in several jurisdictions, are sufficient to pay the debts allowed against

his estate in the several jurisdictions, ordinarily each of the separate jurisdictions proceeds to adjust claims and provide for their payment out of the assets in their control, each independently of the other; but where, as here, the entire assets of the deceased are insufficient to pay all his just obligations, there is such an interdependence between the various jurisdictions as to require the application of the old maxim that "Equality is equity;" and the several courts administering the affairs of the deceased, each being apprised of that situation, must no longer consider the assets within their respective controls as separate and distinct funds for distribution to the creditors within such jurisdictions, but as one entire fund in which all creditors of the deceased having just claims of equal standing shall share *pro rata.* It makes no material difference by whom or how the situation is brought to the knowledge of the court. In this case the petition of the executrix alone was sufficient. It is the fact of insolvency that raises the equity. It then becomes the duty of the court itself, administering the assets, to subordinate the demands of the local creditors to be paid in full or to the exhaustion of the assets to the broader rights of the creditors as a whole to share on an equal footing in the assets as a whole.

That such well grounded equitable principle is consonant with the proper self-respect which a government should maintain was early declared in the case of *Dawes v. Head,* 3 Pick. (20 Mass.) 128. That ruling was constantly followed in Massachusetts, and subsequently became the statutory declaration as well (*Buswell v. Order of the Iron Hall,* 161 Mass. 224, 233, 36 N. E. 1065); and such has been done in other states, as shown in *Dow v. Lillie,* 26 N. Dak. 512, 144 N. W. 1082, L. R. A. 1915D, 754. It is the rule in the domicile in the instant case. *Ramsay v. Ramsay,* 196 Ill. 179, 188, 63 N. E. 618. The same is declared elsewhere. *Tyler v. Thompson,* 44 Tex. 497; *Mitchell v. Cox,* 28 Ga. 32; 2 Schouler, Wills (5th ed.) §§ 1015*a,* 1174;

24 Corp. Jur. 1125; 11 Ruling Case Law, 444. It is but the application in another form of the rule that is applied in the distribution of the assets of an insolvent corporation foreign to the distributing jurisdiction where resident and nonresident creditors must share *pro rata*. *Blake v. McClung,* 172 U. S. 239, 19 Sup. Ct. 165; *Buswell v. Order of the Iron Hall,* 161 Mass. 224, 233, 36 N. E. 1065; *Thornley v. J. C. Walsh Co.* 207 Mass. 62, 66, 92 N. E. 1007.

It is of course proper that sufficient of the assets belonging to the estate and found in Wisconsin should be held here so that when the proper percentage is ultimately determined in the two jurisdictions the creditors whose claims are filed and allowed in this jurisdiction shall be here paid their proper percentage.

On the second question suggested it is clear that, there being assets of the deceased and resident creditors within the state of Wisconsin, the county court of Milwaukee county had and properly assumed jurisdiction in the ancillary administration. Sec. 3793, Stats.; *Will of Harker,* 172 Wis. 99, 178 N. W. 246; *Barlass v. Barlass,* 143 Wis. 497, 128 N. W. 58. Having such proper jurisdiction, it became the duty of such court to receive, examine, and adjust the claims and demands of all persons against the deceased as provided for in sec. 3838, Stats., which reads as follows:

"On filing a petition for the probate of a will or petition for administration by any county court it shall be the duty of such court to receive, examine, and adjust the claims and demands of all persons against the deceased."

Under such statute as well as under the general principles governing such matters, no distinction can be made between ancillary administration and domiciliary administration as to the rights of nonresident creditors to file, in accordance with the established practice of this state, their claims against such an estate for adjustment and allowance. That nonresident creditors may prove their claims in an-

cillary administration is the general rule. 11 Ruling Case Law, 443; 24 Corp. Jur. 1124. See note in L. R. A. 1915F, p. 1041; *Borer v. Chapman,* 119 U. S. 587, 7 Sup. Ct. 342.

We can see no proper ground under our statutes or decisions for drawing any harsh distinction as such a one would be between the rights of nonresident claimants where the administration here is that of the domicile and where it is merely ancillary. The question was not before the court in the recent case of *Will of Harker,* 172 Wis. 99, 178 N. W. 246, that decision only holding upon the situation there presented that the county court there exceeded its proper functions in attempting to construe a will and the duties of trustees thereunder, that being properly for the Illinois court having domiciliary administration.

In view of the holding now made that creditors filing claims in this jurisdiction of ancillary administration can thereby acquire no preference over creditors whose claims are duly allowed at the domicile, it does not seem necessary to determine the questions presented upon the claim of the executors of the estate of Julius W. Loewenthal, who had commenced an action against Joseph Hanreddy in Illinois and after his death and subsequent revival of the action as against his executrix had obtained judgment against her in that state. There being no advantage to be gained by the filing of such judgment or allowance thereof as a claim in the jurisdiction here over that which they have already acquired in the probate court of Cook county, we do not deem it necessary to now determine whether or not such a judgment, obtained as it was against an executrix in another state, should be considered as such a judgment as may be certified to the county court as provided for in sec. 3846, Stats., or as to whether or not, it not having been presented to the court below until after the time fixed for the presentation of claims, it is thereby barred by sec. 3844, Stats.

The situation, however, would seem to be almost parallel with that presented in the case of *Brown v. Fletcher's Estate,* 210 U. S. 82, 28 Sup. Ct. 702, affirming the same

case in 146 Mich. 401, 109 N. W. 686. A discussion of the subject is also found in a note in 3 A. L. R. 64, to the case of *Nash v. Benari,* 117 Me. 491, 105 Atl. 107.

It follows from what has been said that the order and judgment of the county court must be reversed.

In view of the peculiar situation presented in this matter, we deem it best to deny the allowance of costs to any party on this appeal, except that the costs of the clerk of this court are to be paid out of the estate.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment in accordance with this opinion.

DOERFLER, J., took no part.

A motion for a rehearing was denied, with $25 costs, on April 11, 1922.

GUARDIANSHIP OF REEVE.

January 14—April 11, 1922.

Wills: Fraud on residuary legatees: Settlement with alleged issue of intervening legatee: Cancellation on discovery of fraud: Laches: Limitation of actions: Probate courts: Control of judgments and records: Relief cognizable solely in equity: Guardian and ward: Jurisdiction of court: Fraud of heirs as affecting inheritance.

1. Residuary legatees were not barred by laches from seeking a cancellation of proceedings in which they had made a settlement with a child claimed by the surviving widow of testator's son to be his issue, on her subsequent confession that such child was not the son's issue, though the residuary legatees had suspected fraud, where the evidence was insufficient to warrant any reasonable expectation of success in establishing fraud.
2. Such residuary legatees were not barred by the statute of limitations where the fraud perpetrated was not discovered until one year prior to the commencement of the action, even

though they had previously suspected the fraud. This action, being to clear the records of the probate court, is one in which relief could be sought only in chancery, and under sub. (7), sec. 4222, Stats., does not accrue until discovery of the fraud.

3. On discovery by the county court that the child whom the surviving wife had fraudulently claimed to be the issue of her deceased husband, and for whom the court had appointed a guardian, was not in fact the husband's child, it was proper for the court to cancel proceedings in which the guardian had received a certain sum for releasing the child's claim as the issue of the husband to certain property, and to order the guardian to refund the amount so received to the persons who paid it.
4. The duty and power of the county court, so far as it affects the property of a deceased person, is not impaired by mere lapse of time, so long at least as title to real property, under the special statutes regulating that subject, is not questioned or rights of innocent purchasers of real or personal property affected.
5. A decree of the probate court may be subsequently annulled when clearly shown to be without foundation in law or in fact, the jurisdiction to grant such relief being primarily in such probate court rather than in a court of general equity powers.
6. The actual existence of a ward is a required jurisdictional fact to make valid an order in guardianship proceedings in county court under sec. 3962, Stats.
7. The county court, on discovering that a surviving wife had perpetrated a fraud in passing off as the issue of her deceased husband a baby not in fact the husband's child, for whom the court had appointed a guardian, will order funds in the hands of the guardian, acquired by the ward as heir at law of the husband, to be given to the surviving wife as sole heir of the husband, notwithstanding the wife had perpetrated such fraud, since the guardianship proceedings are void for want of a ward, making it necessary for the court to dispose of the funds in the hands of the guardian to the persons entitled thereto, and since the surviving wife, as sole heir of the husband, is the only person entitled thereto.

OWEN and ROSENBERRY, JJ., dissent.

APPEAL from a judgment of the county court of Winnebago county: FRED BEGLINGER, Judge. *Affirmed on appeal*

of Charles H. Forward, guardian ad litem; reversed on that of Amelia E. Anderson.

In 1891 one Thomas T. Reeve, resident of Oshkosh, died leaving three adult children. In November, 1892, his will was duly probated. It provided among other things that a certain piece of real estate in the city of Oshkosh and designated herein as 161 Main street should be held in trust for the benefit of his widow during her lifetime (she dying in April, 1905); upon her death a similar trust during the life of his son George K. Reeve; upon the death of the son leaving issue him surviving, then outright to such issue; in default of such issue to his residuary legatees, his two daughters.

In 1893 the said George K. Reeve married one Amelia E. Johnson. A child was born to them in 1897 which died in 1898.

On January 17, 1902, George K. Reeve died intestate leaving only a piece of real estate described as No. 17 Main street in said city of Oshkosh.

On February 1, 1902, his widow, *Amelia E. Reeve,* made petition for administration of his estate, reciting that he left him surviving as the only heirs his widow and one son named *Lucas T. Reeve,* then about four months of age. In March letters of administration were granted to Mr. John Harrington.

In June, 1906, *Amelia E. Reeve* petitioned the county court of Winnebago county for the appointment of a guardian for *Lucas T. Reeve,* alleged to be then of the age of four years and eight months, and on the 21st of June *George B. Simmons* was appointed and qualified as guardian.

On August 14, 1906, a final decree was entered in the estate of George K. Reeve. The personal property, being rents from the real property amounting to about $280, was assigned one third thereof to the widow, *Amelia E. Reeve,* as her dower interest, the balance to *George B. Simmons*

as general guardian of said *Lucas T. Reeve.* The real estate, namely, No. 17 Main street, was assigned to the said *Lucas T. Reeve* as minor heir of the deceased, subject to the unassigned dower rights of the said *Amelia E. Reeve.*

In 1907 Caroline E. Fraker, one of the daughters of Thomas T. Reeve, died leaving as her sole heir *Mary R. Fraker.*

In February, 1908, the daughter, *Mary E. Miller,* and the granddaughter, *Mary R. Fraker,* of Thomas T. Reeve commenced an action in the circuit court for Winnebago county against *Amelia E. Reeve, Lucas T. Reeve,* and others to quiet plaintiffs' title to No. 161 Main street, devised by the will of Thomas T. Reeve, asserting that they had taken possession of said 161 Main street upon the death of the widow of Thomas T. Reeve and collected the rents therefrom, and also asserting that the said *Amelia E. Reeve* had fraudulently pretended and represented that there was in fact a son born to her and the said George K. Reeve, in the petitions for administration of the estate of George K. Reeve and the guardianship of said *Lucas T. Reeve* as above recited, and alleging that as a matter of fact there was no such child and for that reason there had been no vesting of the title to said 161 Main street, upon the death of the widow of Thomas T. Reeve, in any other than said plaintiffs.

It appears that service of such complaint and summons, together with a subpœna and notice of the proposed examination of said *Amelia E. Reeve,* was made upon her in the city of Oshkosh. She at that time was a nonresident of Wisconsin and had been such for most of the time since the death of George K. Reeve. The proposed examination appears to have been continued from time to time, but she never was examined in said proceedings and nothing further seems to have been done therein.

Negotiations were had between the interested parties and then application was made by *Amelia E. Reeve* to the county court for a sale of the interest of *Lucas T. Reeve* in said

161 Main street, reciting among other things that she still claims that *Lucas T. Reeve* is the issue of said George K. Reeve and his sole heir, that she has no desire to litigate the facts in regard thereto, and is not willing to appear or give evidence in the action instituted on February 28, 1908, recited above. The guardian made a similar application, and by agreement between the parties concerned a sale of the interest of the alleged *Lucas T. Reeve* as heir was then made to the said *Mary E. Miller* and *Mary R. Fraker* for $4,000, and $500 paid by them in addition thereto, to the said guardian, as a settlement for all claims and demands on behalf of said alleged infant for the rents and income received by the said *Mary E. Miller* and *Mary R. Fraker* during their possession of said premises after the death of the widow of Thomas T. Reeve. Such proceedings were confirmed in the county court in April, 1908.

Pursuant to applications, allowances were made from time to time by the county court out of the funds in the hands of the guardian of sums to *Amelia E. Reeve* as and for the support, care, and maintenance of said *Lucas T. Reeve,* such payments continuing until the year 1916, at which time there had been so paid to her $1,950.

In January, 1914, the property No. 17 Main street, left by George K. Reeve, was sold upon proceedings not in any way questioned here so far as the title to the real estate is concerned, by *Mr. Simmons* as guardian for $7,000, out of which sum *Amelia E. Reeve* was awarded $1,272, which was accepted by her as and for her dower interest in said property, and the balance thereof remained in the possession of the said guardian.

Some time in 1918, after a consultation by *Mrs. Reeve,* who in the meantime had married one Frank P. Anderson, with Mr. Louis Reuscher, an attorney at law of Cincinnati, Ohio, it was disclosed to the persons interested that *Amelia E. Reeve,* now *Anderson,* now asserts that there had been no such child as *Lucas T. Reeve* born to her and the said

George K. Reeve, and that the infant which she had brought to Oshkosh and presented to *Mr. Simmons* at the time of the petition for and the appointment of him as guardian of the alleged *Lucas T. Reeve* in 1906 was, as a matter of fact, one Marshall Beamon, the son of one William Beamon and Laura Beamon, his wife, and whom the said *Amelia E. Reeve* at the time had procured from an asylum in Chicago where such child had been left by his parents.

Upon learning this, and in December, 1919, *Mary E. Miller* and *Mary R. Fraker* petitioned the court below to have the proceedings of 1908 upon which they had paid the $4,500 to *Mr. Simmons* as guardian for a release of all claims of the alleged *Lucas T. Reeve* to 161 Main street, to which, but for the claim of the existence of *Lucas T. Reeve* as issue of George K. Reeve, they would have absolute title, canceled and held as naught, thereby relieving their title to such property from any cloud thereon by reason of the assertion of the existence of such alleged issue of George K. Reeve, and also for a refund of the $4,500 so paid by them, together with accrued interest thereon, basing their claim for relief upon the facts disclosed from the admissions of *Mrs. Anderson* of the fraud that she had perpetrated in falsely asserting the existence of issue of George K. Reeve. The guardian appeared in opposition to such petition, put the petitioners to their proofs as to the facts alleged, and asserted that any claim by them for such refund was barred by the statute of limitations and also on the ground that the petitioners are estopped from so and now asserting such claims. *Charles H. Forward,* who had been appointed guardian *ad litem* for the alleged minor, *Lucas T. Reeve,* also appeared and took a similar position.

Amelia E. Anderson, formerly *Reeve,* appeared and by verified pleading admitted that there was no issue of George K. Reeve surviving him and that she had used the child, Marshall Beamon, for the purpose of representing him to be such alleged issue under the name of *Lucas T. Reeve.*

She asked that the final decree and order of distribution made on August 14, 1906, whereby the residue of said estate of George K. Reeve was assigned to the said *Lucas T. Reeve,* be modified, and that the balance of the money in the hands of *George B. Simmons* as guardian, after the repayment to *Mary E. Miller* and *Mary R. Fraker* of the amount to be allowed them, should be paid over to her as sole heir at law of the said George K. Reeve, deceased.

To this prayer for relief on behalf of *Amelia E. Anderson* the guardian *ad litem, Charles H. Forward,* asserted that the same was barred by the statute of limitations and prayed for the dismissal of such cross-complaint or demand.

Upon the hearing in the county court upon this matter the testimony of *Amelia E. Anderson,* taken by deposition, was received, and in such testimony she again under oath asserted that there had been no child born to her and the said George K. Reeve as had been theretofore alleged by her and that the child presented by her at Oshkosh in 1906 was said Marshall Beamon. Photographs had been taken of a then neighbor's child and of Marshall Beamon while *Mrs. Reeve* had him in Oshkosh in 1906 and which were on this hearing identified by the neighbor as being the child so represented by *Mrs. Reeve* to be *Lucas T. Reeve,* and such photograph was further identified by William Beamon, whose deposition was also taken and used on the hearing, as being of his son Marshall Beamon.

The trial court then adjudged that any and all proceedings by said court in the matter of the estate of George K. Reeve and in the matter of the guardianship of *Lucas T. Reeve,* a minor, in any manner adverse to the rights of *Mary E. Miller* and *Mary R. Fraker* as sole devisees of the real estate described as 161 Main street, were void and of no effect and were set aside; that the sum of $6,177.19 then in the hands of said *George B. Simmons* as guardian of *Lucas T. Reeve* is the property of, belongs to, and should be paid to said *Mary E. Miller* and *Mary R. Fraker* (said sum being

for the $4,500 paid by said petitioners in 1908, together with interest thereon, and concerning the correctness of which amount no question is made in these proceedings).

It was further held that the balance left in the hands of said *George B. Simmons,* as such guardian, should be held to stand and remain for the benefit of the said Marshall Beamon; that the relief prayed for by the said *Amelia E. Anderson* should be in all things denied and dismissed upon the merits, and that she be barred from any and all claim whatsoever against any of the balance of the funds remaining in the hands of said *George B. Simmons* as such guardian.

Charles H. Forward as guardian *ad litem* of said alleged infant, *Lucas T. Reeve,* and *George B. Simmons* as guardian, appeal from so much of the judgment of the court as directed the payment of the specified sum to *Mary E. Miller* and *Mary R. Fraker; Amelia E. Anderson* appeals from so much of the order as bars her from any claim to the balance of said fund in the hands of the guardian and as dismisses her cross-complaint upon the merits.

Charles H. Forward of Oshkosh, guardian *ad litem,* for the appellant *Lucas T. Reeve,* minor.

For the appellant *Amelia E. Anderson* there was a brief by *Louis Reuscher* and *Stewart & McDonald,* all of Oshkosh.

For the respondents there was a brief by *Thompson, Gruenewald & Hull* of Oshkosh, and oral argument by *John C. Thompson.*

The following opinions were filed February 7, 1922:

ESCHWEILER, J. The explanation offered by *Mrs. Anderson,* formerly *Reeve,* as to her false assertion in February, 1902, of the birth of a child in October, 1901, and her subsequent similar assertions, is to the effect that her husband in the fall of 1901 had caused to be published and announced that there was a child born to them while

Mrs. Reeve was absent from Oshkosh, and that through his efforts a false certificate of the birth of such alleged child had been obtained from a physician in Indianapolis, Indiana, and recorded there, and that upon the death of George K. Reeve she desired to continue the representation which had been so made by him. She was of course thereby renouncing her right as sole heir at law of George K. Reeve to the ownership of No. 17 Main street, property subsequently sold for $7,000, and contented herself with asserting but a dower interest therein while continuing to carry out such representations.

The proper solution of the problem presented on this phase of the case is more within the field of psychology than that of the law, and we must content ourselves with saying that under the record as presented the trial court was amply justified in law and supported by the facts in reaching his conclusion, although based as it must be largely upon the testimony of *Mrs. Reeve* confessing the fraud she perpetrated upon the court, and it must therefore be taken as verities that George K. Reeve died without living issue him surviving; that upon his death all his title to No. 17 Main street passed to *Amelia E. Reeve,* his widow, as his sole heir at law; that upon the death of the widow of Thomas T. Reeve all the latter's title to 161 Main street passed to his residuary devisees, whose interests are represented by the petitioners herein.

The trial court was also justified in his finding that although the two daughters of Thomas T. Reeve had grounds for suspecting in 1902 that there was no surviving issue of George K. Reeve, yet in the face of the birth certificate recorded in Indianapolis, Indiana, and discovered by their agents, the continued assertion by *Mrs. Reeve* that there was a child *Lucas T. Reeve,* the producing of the child Marshall Beamon as such in Oshkosh, her continued assertion to the same effect in the proceedings instituted in 1908 whereby it was sought to question such claim, still their suspicions were

insufficient to warrant any reasonable expectation by them of success in then establishing such fraud, and that therefore they did not have sufficient knowledge to charge them with the duty of making positive assertion thereof until less than one year before the commencement of these proceedings, and the conclusion of the court based on such finding must stand.

It must be observed here that all the proceedings taken by *Mrs. Anderson* in connection with her strange fraud were done without the apparent advice of any one and without having retained on her own behalf any attorney, until apparently some time in 1918 she consulted with Mr. Louis Reuscher, a member of the bar of Cincinnati, Ohio, who, it is pleasing to note, upon learning the situation, with commendable promptness and propriety caused the real situation to be disclosed to the guardian and the others interested.

The purpose of the petitioners *Mary E. Miller* and *Mary R. Fraker* in asking for the relief granted them by the court below was twofold: one, to clear from the records of the probate court of Winnebago county all findings or adjudications which in effect held that there was issue surviving George K. Reeve, whereby the title of the petitioners under the will of Thomas T. Reeve to the real estate at 161 Main street would be subject to question, inasmuch as if there were such issue the petitioners had no title, if there were no such issue they had absolute title; and secondly, to have refunded to them the moneys paid by them in 1908 to the guardian in what was then a good-faith attempt on their part to purchase their peace from such assertion of a superior title to said real estate then falsely made by *Mrs. Reeve* and innocently, and therefore properly, maintained by the guardian.

From what has been said as to the very evident propriety of the finding by the trial court that under all the facts and circumstances there was no such knowledge on the part of the petitioners of the falsity of such brazen assertion by *Mrs. Reeve* that she was the mother of issue of George K.

Reeve him surviving as to charge the petitioners with any duty to do more than was done by them, it is clear that the petitioners cannot be deprived of their rights on the ground of any alleged laches on their part, and no more need be said on that score.

Neither can the petitioners be denied their right to relief as to either of the purposes presented in their petitions on the ground that they are barred by the provisions of any statute of limitations. If any such statute were applicable it could be none other than sub. (7) of sec. 4222, Stats., which requires the bringing within six years of any action for relief on the ground of fraud in any case which was before 1857 cognizable by the court of chancery, and providing that "the cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud."

Under the testimony supporting the conclusion of the trial court there was no such discovery of the fraud perpetrated by *Mrs. Anderson* to bring it within any reasonable interpretation to be given to the quoted language of the statute just above cited until within one year prior to the commencement of this action. The mere suspicion which had existed during all this time was not of sufficient weight and dignity to make it a discovery of the fraud such as is contemplated in the statute. *Estate of O'Neill,* 90 Wis. 480, 63 N. W. 1042; *O'Dell v. Burnham,* 61 Wis. 562, 570, 21 N. W. 635; 25 Cyc. 1192; *Larson v. McMillan,* 99 Wash. 626, 170 Pac. 324. And such is especially so where, as here, the knowledge as to the real facts is so particularly with the one who was so falsely asserting her motherhood and refusing to be examined as a witness, as she might perhaps continue to do, being at the time a nonresident. There was also in a measure an exhaustion by the petitioners of their sources of information when they had started their action in 1908, and their duty to proceed should be considered as then ended. 25 Cyc. 1193.

It is also evident that the relief sought in this case, which

involved primarily a clearing of the records of the probate court of all proceedings which were the result of the fraud perpetrated by *Mrs. Anderson* in her false assertion as to the birth of issue of George K. Reeve, is one in which relief could be sought only in a court of chancery.

We are also satisfied that the court below, in clearing its records of the result of the fraud perpetrated upon it and the restoring of the money to the petitioners, was amply justified upon still broader grounds than merely overruling the objections interposed to such relief based upon the plea of laches or of the statute of limitations.

At the close of the hearing and upon its conclusions as to the facts as above stated, the county court found itself in this position, viz.: that there was in its present control and subject to its orders a fund in the hands of one who was at least a *de facto* officer of the court, namely the guardian; all this pursuant to proceedings in the same court based upon the false assumption that there was in existence a living surviving issue of George K. Reeve, knowledge then brought home to the court that there never has been any such minor, present necessity of clearing its records of that which was the result of fraud, and finally to make a lawful disposition of such funds.

To meet and dispose of such a peculiar situation there manifestly ought at least to be judicial power and authority somewhere. We have no difficulty in determining that there exists such an inherent power in the very nature of the county court having the primary duty of administering testate or intestate property. Its duty and power, so far as it affects the property of a deceased person, is not impaired by mere lapse of time, so long at least as title to real property under the special statutes regulating that subject is not questioned or rights of innocent purchasers of real or personal property affected. It may assume jurisdiction to administer the estate of a deceased at a period long subsequent to the death, and it long continues to have jurisdiction to clear its

records of that which, because of fraud, it was induced to do or for which it lacked jurisdiction.

Neither long and unexplained delay nor any provision of the statute of limitations can be successfully invoked against the power and duty of a probate court to probate a will whenever duly presented to it for that purpose. *Hanley v. Kraftczyk,* 119 Wis. 352, 356, 96 N. W. 820; *Will of Brandon,* 164 Wis. 387, 391, 160 N. W. 177; *Estate of Hume,* 179 Cal. 338, 343, 176 Pac. 681 (citing on page 346 decisions from Idaho and Kentucky only to the contrary); note to 57 L. R. A. 253. That a court of probate jurisdiction as distinguished from other courts has such inherent power over its judgments has been repeatedly declared by this court. *In re Fisher,* 15 Wis. 511, 521; *Israel v. Silsbee,* 57 Wis. 222, 228, 15 N. W. 144; *Archer v. Meadows,* 33 Wis. 166; *Estate of O'Neill,* 90 Wis. 480, 484, 63 N. W. 1042; *Parsons v. Balson,* 129 Wis. 311, 318, 109 N. W. 136; *Scheer v. Ulrich,* 133 Wis. 311, 316, 113 N. W. 661; *Estate of Staab,* 166 Wis. 587, 592, 166 N. W. 326.

The doctrine is recognized in other jurisdictions, as in *Fidelity & C. Co. v. Withington,* 229 Mass. 537, 118 N. E. 902, where a decree of the probate court discharging a surety, which discharge had been obtained on false statements then made to the court, was vacated although sixteen years had elapsed; and in *Jones v. Jones,* 223 Mass. 540, 112 N. E. 224, where a new order of distribution was made twelve years after the first one.

A decree of the probate court may be subsequently annulled when clearly shown to be without foundation in law or in fact. *Merrill T. Co. v. Hartford,* 104 Me. 566, 572, 72 Atl. 745.

It is also clear that the jurisdiction to grant such relief is primarily in such probate court rather than in a court of general equity power. *Archer v. Meadows,* 33 Wis. 166, 172; *Thompson v. Nichols,* 254 Fed. 973.

The reason for such broader and more unlimited power

as to its own proceedings being vested in probate courts may well be based upon the peculiar nature of such courts, as shown in the interesting discussion of the subject in *Waters v. Stickney*, 12 Allen (94 Mass.) 1, and because there an overlooked codicil to a will, found on the back thereof, was probated fifteen years after the will was admitted. Unlike the courts of purely civil jurisdiction, which are concerned primarily with disputes between the living, the probate courts always have in their administration proceedings as a silent party, but none the less never to be overlooked, the deceased, whose directions as to the disposition of his property, lawfully expressed by will, or, when intestate, by the statutes of administration, must be preserved by the probate court even as against the wishes and desires of all the living parties before the same court. *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice,* 150 Wis. 401, 448, 136 N. W. 956, 137 N. W. 778; *Estate of Staab,* 166 Wis. 587, 166 N. W. 326.

There was not merely improper exercise of jurisdiction by the probate court in the appointment of a guardian for the alleged minor, *Lucas T. Reeve,* but an absolute and complete want of jurisdiction. The actual existence of a minor for whom guardianship proceedings purport to be taken is as much an essential element for jurisdiction as is the death of an individual for whom administration proceedings are attempted.

The decisions are numerous that unexplained absence for over seven years, which in the law of evidence raises a presumption of death, is of no effect to give validity to administration proceedings where predicated upon such unexplained absence, the person being alive. *Melia v. Simmons,* 45 Wis. 334; *Wis. T. Co. v. Wis. M. & F. Ins. Co. Bank,* 105 Wis. 464, 469, 81 N. W. 642; *Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; *Scott v. McNeal,* 154 U. S. 34, 49, 14 Sup. Ct. 1108, citing 45 Wis. 334, *supra,* and many

other cases, at p. 43; *Jochumsen v. Suffolk Sav. Bank,* 3 Allen (85 Mass.) 87; *Stevenson v. Superior Court,* 62 Cal. 60.

The distinction between such attempted administration proceedings, absolutely void because the individual whose estate is attempted to be administered is alive, and the statutory proceedings provided for in Pennsylvania under the police power, whereby the property of absentees is conserved and in some measure distributed, is clearly pointed out in *Cunnius v. Reading School Dist.* 198 U. S. 458, 25 Sup. Ct. 721, which distinguishes, at page 472, the situation presented under such statutes from those presented in the cases first above cited. A similar ruling is made in passing upon a like statute in Massachusetts in the two cases of *Provident Inst. for Savings v. Maloney,* 221 U. S. 660, 31 Sup. Ct. 661, and *Blinn v. Nelson,* 222 U. S. 1, 6, 32 Sup. Ct. 1.

If death as well as domicile at the time of the death are each jurisdictional facts necessary to exist in order that a probate court may administer an estate, as held in *Barlass v. Barlass,* 143 Wis. 497, 498, 128 N. W. 58, it must be equally true that actual existence of a ward is a jurisdictional fact required for any validity to an order of a county court appointing a guardian under sec. 3962, Stats.

There being no ward there could be no guardianship proceedings. And the court should therefore vacate and hold for naught its adjudications in such alleged guardianship proceedings. The court therefore finds itself with the control and disposition of a fund in the hands of a *de facto* officer of the court, for such the guardian must be held so far at least as the property in his hands is concerned, and the duty is plain on the court to restore, as he did, so much of the fund as has been improperly received from the petitioners. Manifestly neither the guardian nor the guardian *ad litem,* as such, can assert any personal right to have the

funds or any part thereof remain in their control, nor is there any one in whose behalf they may assert any right or interpose any plea.

The appeal of *Amelia E. Anderson* from the order of the court below dismissing her petition for the payment to her of the balance of the funds in the hands of the guardian presents a more perplexing question.

The Gordian knot so presented was solved by the trial court by declaring that the actions of *Mrs. Anderson* in presenting to the guardian and the court the minor, Marshall Beamon, as being the mythical and nonexistent *Lucas T. Reeve* and the living issue of George K. Reeve at the time of the appointment of the guardian and at about the time of the final settlement of the estate of George K. Reeve, her acquiescence in the assigning of the real property to the alleged *Lucas T. Reeve* as such heir and contenting herself with but her dower right, thereby vested that which would have belonged to *Lucas T. Reeve,* if there had been such infant, in and to the boy Marshall Beamon, and that she is now estopped by reason of her fraud from asserting title to the proceeds from the sale of the property.

Much as we regret to be obliged to hold that one like *Mrs. Anderson,* party to a deception on the court, should nevertheless be permitted to benefit by the very same proceedings and in the same court in which she perpetrated her fraud, yet nevertheless we feel constrained to hold that the disposition made by the trial court as presented here upon her appeal cannot be sustained.

She was not aware of the existence of Marshall Beamon and he formed no part of her design or scheme at the time of the application for administration on the estate of George K. Reeve in February, 1902. What she did then was certainly not with a view of conferring any benefit upon Marshall Beamon. That purpose, if it ever existed, could not have arisen before 1906, when she first met him. She then used him merely as an instrumentality in the scheme

which she had started long before. There was nothing in the shape of a contract, express or implied, between her and Marshall Beamon under which he could claim any cause of action against her in connection with this transaction. Marshall Beamon was not induced to do or refrain from doing anything on his own behalf by reason of what *Mrs. Reeve* did, and so no estoppel can arise. The property that was being disposed of in the final decree in the estate of George K. Reeve was practically all real estate. She conveyed no interest in such property by any writing sufficient under the statute of frauds to Marshall Beamon, either under his own name or under the name of *Lucas T. Reeve.* She never asserted, claimed, or had possession of the personal property in the hands of the guardian so that she could, by delivery thereof, make a valid gift *inter vivos* to said Marshall Beamon. The rights and title of George K. Reeve in the real estate, No. 17 Main street, passed to and vested in *Mrs. Reeve* as his sole heir at law upon his death, and it became and is now the primary duty of the probate court to administer the property and determine the ownership thereof as of the time of such death. The balance of the fund derived from the sale of the real estate, No. 17 Main street, is now for all intents and purposes, and most assuredly so far as *Mrs. Anderson* is concerned, substituted for such real estate. It now must be disposed of according to the statutes of distribution and as of the time of the death of George K. Reeve. That the fraud of *Mrs. Reeve,* now *Anderson,* to some extent thwarted and largely delayed that disposition, cannot, we regret to say, defeat the disposition that the statutes have declared the county court must make of intestate property.

The statutes of distribution place the title to this balance of the fund in the hands of the guardian in *Mrs. Reeve* and no one else, and that, therefore, must be the present disposition of such fund. It cannot remain in the hands of the court, it cannot remain in the hands of the guardian. There

is no one who can assert a title to the same which can be recognized by the probate court other than *Mrs. Anderson* as sole heir at law of George K. Reeve, and, the law placing the title to that in *Mrs. Reeve,* the courts have no other alternative than to follow such statutory direction.

It follows therefrom that so much of the judgment of the court below as directed the payment of the specified amount to the petitioners is affirmed; so much thereof as denied the petition of *Mrs. Anderson* and dismissed the same must be reversed, and an order be made directing the payment to *Mrs. Anderson* of the balance left in the hands of the guardian, after deducting therefrom the proper allowances to be fixed by the court below for the services of the guardian and guardian *ad litem* as *de facto* officers of the court. The fees of the clerk of this court and the costs of the petitioners on this appeal are to be allowed out of the funds in the hands of the guardian. No other costs to be allowed.

By the Court.—So much of the judgment as awards payment to the petitioners is affirmed; so much thereof as directs the dismissal of the petition of *Mrs. Anderson* is reversed, and the cause remanded with directions to enter judgment in accordance herewith.

OWEN, J. (*dissenting*). I cannot agree that *Amelia E. Anderson* is entitled to relief at the hands of a court of equity. After perpetrating the most ingenious and deliberate fraud upon the court, she now comes in, confesses her perfidy, and asks relief from the consequences thereof. This, the majority opinion holds, must be granted in order to protect the sacred right of the deceased that his property descend in accordance with his will, which in this instance finds expression through the law regulating the descent and distribution of estates. That this is a sacred right and will be absolutely protected by the courts is readily conceded. That, in order to protect such right, ancient and well-

grounded principles, such as "He who comes into a court of equity must come with clean hands," will be disregarded and trampled upon, need not here be questioned.

The deceased husband of *Amelia E. Anderson* left no will. His real estate therefore descended as provided by statute. It vested in *Amelia E. Anderson* at the moment of his death. Probate proceedings were unnecessary for that consummation. The function of such proceedings was to clear the real estate of the lien of decedent's debts, to secure an adjudication as to who were his heirs, and a declaration of the court that his real estate vested in such heirs.

After the title to the real estate had vested in *Amelia E. Anderson,* after she was the absolute owner thereof, subject only to the lien of the debts of the deceased, she voluntarily instituted probate proceedings upon his estate, and in such proceedings declared in her petition that the deceased left him surviving a son by the name of *Lucas T. Reeve.* This declaration was false, and was made for the purpose of defrauding the residuary legatees of Thomas T. Reeve. In order to defraud them she had to relinquish her unqualified ownership of the real estate of which her husband, George K. Reeve, died seized. But this, it seems, she was willing to do in order to wrong the residuary legatees of Thomas T. Reeve. At any rate she did it voluntarily, and no reason is perceived why she could not do so. The title had already vested in her when she made application for probate proceedings upon the estate of her husband. At that time she could do as she pleased with her interest in that property. She could have given it away by her deed of conveyance, and the law vesting title to that property in her upon the death of her husband would in no manner have been defeated. When she made application for probate upon his estate, and stated in such application that he left him surviving *Lucas T. Reeve,* a son, it amounted to no more than a voluntary relinquishment of her absolute title to the real

estate. Neither the law, nor the will of the deceased, was frustrated any more than it would have been had she relinquished her interest by her deed of conveyance.

The sacred right of a deceased person to have his property go as he wills is not involved here. The property did go where it was willed, but after title thereto had vested in the beneficiary she voluntarily relinquished it. The right of a deceased person to have the title to his property vest in another does not deprive the beneficiary of the right to transfer the title to a third person. That is the simple result of the machinations of *Amelia E. Anderson* in this case, and the result which she might have accomplished by a deed of conveyance as well as in the manner adopted. It transpires that, when her purpose of defrauding the residuary legatees of Thomas T. Reeve is frustrated, she now wants to recover that with which she so willingly parted in order to consummate her fraud upon them. She now comes into court and in effect says: "If my plan to defraud is to be thwarted, I want my money back." If there ever was a case where a supplicant in a court of equity should be left exactly where she has placed herself, it is this case.

I do not appreciate the significance of the suggestion made in the majority opinion that when *Amelia E. Anderson* represented to the county court that her husband left a son by the name of *Lucas T. Reeve* she did not then have Marshall Beamon in mind as such son. She made the application with fraud in her heart, evidently with the purpose of producing a spurious son when the occasion should require. It might as well have been Tom Jones as Marshall Beamon. Marshall Beamon is but an accident in this case. He was represented to be *Lucas T. Reeve* merely because circumstances chanced to make him available for that purpose. She started out with the plan of defrauding, and simply seized upon Marshall Beamon as a necessary instrument most conveniently at hand to consummate her plan.

Now, then, what is the result in this case? Upon his death the property of George K. Reeve descended to and vested in *Amelia E. Anderson.* No probate proceedings were necessary in order to perfect her title. She succeeded to whatever title he had. When she became vested with that title it was her privilege to do as she pleased with the property. She chose to make use of this property to accomplish fraud upon her sisters-in-law. In carrying out this purpose it became necessary for her to relinquish a portion of her title thereto. This she did freely and voluntarily, for a most despicable purpose. She evidences no disposition on her part to recant, or to recover the property thus parted with, until she learns that her scheme to defraud has been discovered and is about to result in failure. She then comes into this court, confesses her fraud, and asks this court to restore to her that with which she parted for the purpose of accomplishing her fraudulent intent.

This court says that it must do this in order to protect the sacred right of a deceased person to have his property go as he willed it. To my mind, that principle is not involved. Here the deceased's property did go as he willed it, and the beneficiary of his will simply dissipated it to gratify the basest of instincts. This court should leave her just exactly as it found her. It should not concern itself in the least as to what is to become of the money in the hands of the guardian. He may not be entitled to it, but he came into possession of it as an innocent and unwilling instrument in *Amelia E. Anderson's* scheme to defraud her sisters-in-law, and certainly a court of equity should not assist *Amelia E. Anderson* in its recovery. She does not come into court with clean hands, and the court should not be at all concerned with whether she recovers the money in the hands of the guardian of the mythical *Lucas T. Reeve.* In my opinion, the judgment of the trial court upon this branch of the case should be affirmed.

ROSENBERRY, J. I concur in the foregoing dissenting opinion of Mr. Justice OWEN.

A motion for a rehearing was denied, without costs, on April 11, 1922.

STARK, Respondent, vs. BADGER PUBLIC SERVICE COMPANY, Appellant.

February 7—April 11, 1922.

Electricity: Death: Negligence: Res ipsa loquitur.

In an action against a power company for the death of plaintiff's wife, caused by electrocution from the socket of an electric lamp in the basement of plaintiff's residence supplied with electricity upon a secondary wire ordinarily carrying 110 volts, plaintiff's evidence that the deceased stood in a place where contact with a voltage of 110 would not ordinarily result in death or serious injury and that there was an opportunity for the 2,300 voltage of the primary service wires of the company to reach the secondary wires because of the company's negligence in not making reasonable repairs, is *held* to establish *prima facie* defendant's liability under the doctrine of *res ipsa loquitur,* and the burden then rests on the power company to prove that the current did not reach her through the high voltage.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for personal injury resulting in death by coming in contact with an electric light fixture. The defendant furnished light service to the plaintiff at his summer resort at Crystal Lake. The primary service wires carried a voltage of 2,300 to a transformer placed on a pole on plaintiff's premises. From this pole, after passing through a meter, service wires carrying 110 volts were strung to the various buildings of the plaintiff. Some of these were strung parallel to and on the same poles with the primary wires. The

transformer pole was a spliced pole, the splice being just above the surface of the ground, and the pole leaned out of perpendicular about six feet. This brought both primary and secondary wires in contact with some trees, and the insulation became worn off in places. Some of the trees were badly burned, one of about four inches in diameter being burned completely off. This condition had existed for some time and the defendant company had been notified to that effect several times. The primary and secondary wires in one place were only about five or six inches apart, and there was sufficient slack in the wires to permit them to swing together.

On the day of the accident plaintiff's wife went to the basement of the house at about 6:15 in the morning. Plaintiff, who was not yet up, heard a subdued scream and on going to the basement found his wife lying dead on the floor of the laundry near the cellar door. The basement had two rooms, the laundry and a vegetable cellar. The laundry had a wood floor laid on stringers resting on dry gravel and the cellar had a concrete floor. The door between the cellar and the laundry was open and a drop-cord which hung just within the door had had the metal light guard pulled off and the bulb broken. The guard was found at the side of the deceased.

The jury by a special verdict found (1) that the death of plaintiff's wife, Barbara Stark, was caused by a current of electricity passing into her person from the socket of an electric lamp held in her hand in the basement of plaintiff's house at Crystal Lake, which lamp was supplied with such current upon a secondary wire of the plant and system maintained and operated by defendant at Elkhart Lake for furnishing light and power to its patrons; (2) that the current which caused the death of Barbara Stark was a current of 2,300 volts; (3) that at the time when Mrs. Stark received the injury which caused her death the insulation of the aforesaid secondary wire and the insulation of the pri-

mary wire which in defendant's said system supplied electricity to said secondary wire was worn off from short portions of each of said two wires by contact with a certain standing tree, a part of which is now in evidence here and is marked Plaintiff's Exhibit 8; (4) that those parts of said two wires from which the insulation had been worn off as aforesaid were so near to each other at the side of said tree that the electric current with which the said primary wire was charged passed therefrom through said tree into said secondary wire and was thereby conducted to said lamp and its socket in the basement of plaintiff's house at the time when Mrs. Stark received the injury which caused her death; (5) that the defendant corporation, through its proper agents and representatives, had knowledge of the contact of said wires with said tree, and of their defective condition due to the wearing away of their insulation as aforesaid, during such a length of time that, in the exercise of ordinary care and diligence and before the injury occurred, the defendant should have remedied such defective condition of said wires and have thereafter prevented their contact with said tree; (6) that by the exercise of ordinary care and diligence the proper agents or representatives would have learned of the aforesaid defective condition of said wires and of their contact with said tree in time to have remedied that condition and to have thereafter prevented such contact before the time of Mrs. Stark's injury; (7) that the failure of the defendant to remedy said defective condition of said wires and to thereafter prevent their contact with said tree, before the time of Mrs. Stark's injury, was negligence on defendant's part which amounted to want of ordinary care; (8) that the negligence of the defendant which was found by the answer to the seventh question was the proximate cause of the death of Barbara Stark; (9) that there was no want of ordinary care on the part of the plaintiff, *Louis Stark,* which contributed to cause the death of his wife, Barbara Stark; and (10) damages in the sum of

$3,800. From a judgment entered in favor of the plaintiff for $3,800 and costs the defendant appealed.

For the appellant there was a brief by *Collins & Collins* of Sheboygan, and oral argument by *William B. Collins.*

M. C. Mead of Plymouth and *Charles Voigt* of Sheboygan, for the respondent.

VINJE, C. J. The controversy in this case centers upon the question whether the evidence shows that the deceased was killed by a voltage of 110 or by a voltage in excess of that, owing to the defective condition of defendant's wiring. If the voltage was normal, *i. e.* 110, then there is no liability on the part of the defendant because that is the voltage it was required to furnish. If there was a voltage considerably in excess of that reaching the deceased, it would be liable because such excess could be produced only by reason of the defective condition of defendant's appliances. There is a sharp conflict in the evidence as to whether or not there was an effective grounding of the wires at the meter. That there was a grounding wire there seems well established. But the fact as to whether or not it was effective is in sharp dispute.

The gist of the argument on behalf of the defendant is that there is evidence to show that a voltage of 110 will kill; that the more credible evidence is that a perfect grounding was found to exist after the accident; that a voltage of 2,300 or thereabouts would have wrecked the whole secondary system on the island, whereas no damage was shown except a slight perforation of the fiber insulator on the socket of the drop-cord which the deceased took hold of at the time she was electrocuted. It is further claimed that plaintiff's evidence is so weak and uncertain as to there being more than 110 volts that the verdict rests in conjecture merely and cannot support a judgment. Claim is also made that it may have been the defective condition of the drop-cord and socket that caused the electrocution.

On behalf of the plaintiff it is contended that the evidence in his behalf is certain and definite enough to sustain a verdict; that while it is admitted that death may result from contact with a voltage of only 110, yet such result is only in cases where there is a perfect connection with wet or moist ground or with some good conducting substance, and that death would not result in a case like this where the deceased stood either on the wooden floor of the laundry or else on the reasonably dry concrete floor of the cellar; that connection with a better conductive material must be shown before 110 volts will produce death. It is also claimed by plaintiff that a momentary contact with a voltage in excess of 110 or even as high as 2,300 need not necessarily wreck a secondary system, especially where, as here, the connection took place early in the morning when the system was closed except this light. These respective contentions of the parties are sustained, at least to some extent, by the expert testimony each introduced. In view of the well established rule of law applicable to the case at bar, hereinafter stated, it is not deemed necessary to further discuss the conflicting claims of the parties.

It has been stated that the defendant has argued a defect in the drop-cord or socket. We find no evidence in the record to sustain such claim. It appears from the evidence and from the cord and socket returned as exhibits in the case that both were in good condition, and no defect therein is called to our attention except the slight perforation in the fiber insulator, which perforation may have been made at the time of the electrocution. In defendant's brief it is stated:

"There was practically no mark or burn of any kind on the body discernible to the naked eye, except slight markings on one thumb, and some of the fingers of both hands, but Dr. Hopkinson, by the use of a powerful microscope on cross-sections of tissue, found electrical burns on the thumb and finger of the right hand and the index and middle fingers of the left hand."

It is thus established that the deceased came to her death by means of electricity—in using a drop-cord light located in plaintiff's house having a guard on it. From the evidence it is probable the current went in at one hand and out at the other, though that is not certain, nor very material. But we have this situation: So far as the evidence shows, the electric wiring of the secondary system within plaintiff's house and under his control was in good repair at the time the deceased received the electric shock that killed her. The evidence also shows that it was possible for the current from the primary wire to reach the secondary wire where they were only a few inches apart and where swaying by the wind would cause them to come in contact. Under such proof the doctrine of *res ipsa loquitur* applies and it becomes incumbent upon the defendant to show that death was not caused by an excess current. Curtis, Law of Electricity, sec. 597, states the rule thus:

"The electric current ordinarily used for interior electric illumination is of such low voltage that it will seldom cause injury though it happens to pass through one's body. When, therefore, a person, while turning on an electric incandescent light or otherwise coming in contact with an interior wire or appliance, receives a shock which results in death or serious injury, the maxim *res ipsa loquitur* applies, and the burden of explanation is on the electric company to produce evidence showing that the excessive current was not sent to the building through its negligence." Citing *San Juan L. & T. Co. v. Requena,* 224 U. S. 89, 32 Sup. Ct. 399, 56 Lawy. Ed. 680, affirming 4 Porto Rico Fed. Rep. 356; *Memphis C. G. & E. Co. v. Letson,* 135 Fed. 969, 9 Am. Electl. Cas. 367, 68 C. C. A. 453. See, also, *Whitten v. Nevada P., L. & W. Co.* 132 Fed. 782, 9 Am. Electl. Cas. 179.

He further states (sec. 597):

"In such a case it is immaterial that the electric light or immediate fixture is not under the control or management of the defendant, so long as the injurious current is carried to the building over the wires of the defendant. Negligence

is presumed from the defendant's control of the agency which caused the injury in question, and whether or not the defendant has the control and management of the interior appliance from which incidentally the injury arose is not material," with citations as follows: See cases above cited. Compare *Union L., H. & P. Co. v. Lakeman,* 156 Ky. 33, 160 S. W. 723; *Peters v. Lynchburg L. & T. Co.* 108 Va. 333, 9 Am. Electl. Cas. 1117, 61 S. E. 745, 22 L. R. A. N. S. 1188.

He concludes the statement of the rule with this limitation:

"Where, however, it appears that the interior appliance was defective and that the defect in such appliance materially contributed to the injury, no presumption of negligence arises as against a defendant under no obligation to inspect and repair such interior appliance."

The above statement of the law we deem the proper rule to apply to the situation before us. *Turner v. Southern P. Co.* 154 N. C. 131, 69 S. E. 767, 32 L. R. A. N. S. 848 and note; *Alabama City G. & A. R. Co. v. Appleton,* 171 Ala. 324, 54 South. 638; *Abrams v. Seattle,* 60 Wash. 356, 111 Pac. 168; 16 L. R. A. N. S. 527 and note; *Indianapolis L. & H. Co. v. Dolby,* 47 Ind. App. 406, 92 N. E. 739.

Plaintiff has shown the interior fixture concerned to be in good repair; has shown that the deceased stood in a place, whether on the laundry floor or on the cement floor of the cellar, where contact with a voltage of 110 would not ordinarily result in death or serious injury, because of the poor conducting substance of the floors; has shown further that there was an opportunity for the 2,300 voltage to reach the secondary wires and that such opportunity was due to the negligence of the defendant in not making seasonable repairs. Under such circumstances we cannot disturb the verdict of the jury. It must stand because the defendant did not show that an excess current did not reach the secondary wires. Such excess may not have amounted to

2,300 volts in order to incur liability. Any amount in excess of 110 sufficient to kill under the conditions existing would render the defendant liable.

By the Court.—Judgment affirmed.

IN RE CATFISH RIVER DRAINAGE DISTRICT.

February 10—April 11, 1922.

Drainage districts: Creation: Proceedings: Nature: Lands described in petition but not shown on map: Supplemental petitions: Good faith: Lands benefited in part: Interest of executory vendor and vendee: Interest of life tenant: Computation.

1. Under sec. 1379—11, Stats., lands specifically described in a petition for the organization of a drainage district which was signed by the owner of the lands may be included therein if within the territory constituting the proposed drainage district, though not included in the district as shown by the blue-print map filed with the petition.
2. Lands part of which would be benefited by drainage and other parts of which may be made more accessible, and lands adjoining a proposed district which will be benefited and must be included in the district for the purpose of constructing the drainage ditch, though the area of wet lands therein is small, may be included in the petition for the organization of the district, though only a small portion would be directly benefited, as the preliminary survey need not be as accurate and definite as is contemplated by sec. 1379—18, Stats., when the commissioners make their final report; and the evidence is *held* to justify the order of the court by which the district was organized.
3. Under sub. 6, sec. 1379—11, Stats., supplemental petitions by owners of lands adjoining a proposed drainage district may be filed where the signatures of the owners of one half of the lands in the district have not been obtained to the original petition; but where the lands of the supplemental petitioners do not require drainage, the signatures of the owners thereof being obtained merely to complete the necessary acreage, and the proceedings partaking of the nature of a gerrymander, the petition should be denied.

4. An order of the trial court organizing a drainage district and appointing commissioners pursuant to petitions under sub. 1 (a) to (g) and sub. 6, sec. 1379—11, Stats., will be affirmed, though the creation of the district might not have sprung from the common desire of the landowners to promote the public health or to secure generally the incidental benefits to themselves contemplated by the statute, as indicated by the fact that some who joined in the proceeding subsequently regretted their participation but could not withdraw their signatures.
5. Where a vendee of 220 acres of land, of which 120 acres were included in a proposed district, had paid $8,500 on the purchase price, including $2,500 received from the resale of twenty acres, for which the vendor executed a deed, the trial court properly deducted $2,500 from both the purchase price and total payments and computed the vendee's interest in the remaining 200 acres in the proportion that the adjusted payments and the adjusted purchase price bore to each other, in determining whether the owners of one half of the land included in the district signed the petition; the interests of the vendor and purchaser, both of whom, as holders of the legal and equitable titles respectively, may properly be called "owner" within the drainage statutes, being measured by the parts of the purchase money paid and unpaid.
6. The trial court also properly computed the interest of the owner of a life estate in land included in the district in accordance with her age and the mortality tables; the rule crediting the vendee under a land contract with an interest in the land measured by the part of the purchase money paid being applicable to the owner of the life estate, between whom and the remaindermen the benefits from the drainage should be apportioned ratably.
7. The proceedings under the drainage district law are equitable in their nature and must be liberally construed.

[8. There being sufficient acreage otherwise, it is unnecessary to consider the question whether the lands included in the highways or in the railroad right of way should be credited either in favor of or against the petitioners.]

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The appeal is from an order organizing certain lands located in sections 4, 5, 6, 7, 8, 17, and 18 of the town of Windsor, and sections 13 and 24 of the town of Vienna, into

a drainage district to be known as the Catfish River Drainage District, and from the order appointing commissioners.

In accordance with the provisions of sec. 1379—11, Stats., the petitioners, desiring to organize a drainage district, filed in the circuit court for Dane county, where the lands are situated, a petition for the organization of such a district and the appointment of commissioners thereof, and an examination of the record discloses that such petition complied with sub. (a) to sub. (g) of sub. 1 of said statute.

Under and pursuant to the provisions of sub. 6, sec. 1379—11, Stats., the following persons, the owners of lands adjoining the proposed district, by supplemental petition asked to be joined as petitioners: Knut K. Johnson, Elmer Hustad, Fred Schuman, and A. A. Linde. Thereupon certain landowners filed a remonstrance in said matter, in and by which they contended that less than one half of the lands in the proposed district were owned by the signers of the petition. An objection was also made to the request of the owners filing supplemental petitions to have their lands included in the petitions. By stipulation of the parties it was agreed that the proposed district, as shown by the map, contained 2,252 acres, and that the owners of lands containing 1,040.465 acres had properly joined in the petition. The lands involved in the total acreage in the district in dispute were the so-called Falk lands, consisting of 37 acres, the Linde lands, 40 acres, the Johnson lands, 120 acres, and the Hustad lands, 31.67 acres, so that the total acreage of lands in dispute amounted to 228.67 acres, which, added to the 2,252 acres, would make the total acreage in the district 2,480.67 acres.

The court in its order included all of the disputed lands above mentioned and appointed commissioners in accordance with the provisions of the statute.

For the appellants there was a brief by *Wylie & Sutherland* of Madison, and oral argument by *Fred M. Wylie.*

Robert N. Nelson of Madison, attorney for the petitioners.

Frank W. Lucas of Madison, guardian *ad litem.*

DOERFLER, J. The first four assignments of error relied upon by appellants challenge the court's conclusion in including in the petition the Falk lands and the granting of the supplemental petitions of Linde, Hustad, and Johnson.

While the Falk lands were not included in the proposed district as shown by the blue-print map filed with the petition, nevertheless Falk was one of the signers of the original petition and his lands were specifically described therein, and the court therefore held that his lands were properly included. From the provisions of the drainage act above referred to, the Falk lands could be included in the petition if the lands were within the territory constituting the proposed drainage district or if they adjoined the proposed district. In the latter instance such lands could be included by supplemental petition, to the same effect as though the signer had joined in the original petition. It therefore appears that the provisions of the statute have been fully complied with, and that it was the intention of Falk and the petitioners to include such lands, and that the court was fully justified in including these lands.

With respect to the Falk, Johnson, Linde, and Hustad lands, it is contended by the appellants that the same are not low lands or such as are contemplated by the drainage act to be included in the district, for the reason, as is contended, that only a small portion of any of these lands would be directly benefited by such drainage, and because the attempt to include such lands was, as is alleged, expressly made for the purpose of furnishing the necessary acreage under the statute, in an effort to enforce the organization of the drainage district for the benefit of those signing the original petition, and to the great detriment of other landowners, such as the remonstrants.

Under the provisions of the statute requiring the preliminary survey, it is evident that it is not contemplated that the same shall in all respects be as accurate and as definite as is contemplated by sec. 1379—18, Stats., when the commissioners make their final report. There is evidence with respect to all of these lands in controversy that a part of them in each instance is included in what is known as wet lands, or lands that would be benefited by drainage. Some of these lands, although high, contain considerable tracts which include what are known as pockets, and where drainage would be of decided benefit. High lands may also be benefited by drainage, though not to the same extent as the low lands, by reason of the fact that such lands may thereby be made more accessible. With respect to the Falk lands, the area of wet lands, from an examination of the map, appears small. However, it is probable that a large portion of the lands adjoining the district, as outlined upon the map, will be greatly benefited by the drainage, and it would appear from the map that it is necessary to include the Falk lands for the purpose of constructing the ditch. In any event, the testimony as it appears from the record is sufficient to justify the court in its order by which the drainage district is organized.

When the original petition was filed the requisite number of signatures had not been obtained, and in order to supply the necessary acreage the supplemental petitions have been procured and filed. A situation like this, however, was clearly contemplated by the legislature in the enactment of the drainage law. The wisdom of enacting such provision rests entirely with the legislature. Of course, where it appears that the lands of the supplemental petitioners do not require drainage, and where the signatures of the owners to such supplemental petitions are expressly obtained in order to complete the necessary acreage, and where the proceedings partake of the nature of a gerrymander, the court should deny the petition. The statute contemplates either

a majority of landowners owning a certain percentage of the land, or the owners of more than one half of the lands within the district, and under the law it is contemplated that the lands included in the proposed district shall be such as will be benefited.

It also appears that some of the owners of lands in the proposed district who have joined in this proceeding have since regretted their participation. Their signatures, however, cannot be withdrawn, and their present attitude is only significant from the viewpoint that the creation of this drainage district did not spring from the common desire of the landowners to promote either the public health or to secure generally the incidental benefit to landowners contemplated by the statute.

In deference to the superior advantages afforded to the trial court in the hearing of the matter, we conclude to affirm the conclusions of the trial court on this branch of the subject, notwithstanding our views as above expressed, under and pursuant to which we would hesitate seriously to grant the petition if the matter were an original proposition before us.

Knut K. Johnson is the vendee of 120 acres of land under a land contract from one Knudson, forty acres of which land were included in the original district and signed for by him in the original petition, and eighty acres of this land so held by him were included in a supplemental petition. Johnson had purchased 220 acres of land on land contract from Knudson for the sum of $26,750, on which land he made payments amounting to $8,500. Two thousand five hundred dollars of the moneys paid on the contract price were moneys received from the sale of twenty acres of said lands, which money Johnson turned over to Knudson, who executed a deed for said twenty acres. The trial court deducted the amount of the payment, viz. $2,500 for the twenty acres, from the purchase price of $26,750, and also from the amount of the payments made by Johnson, viz.

$8,500, and computed his interest in the remaining 200 acres in the proportion that $6,000 bears to $24,250, and in accordance with such computation fixed the interest of Johnson, as an owner in the 120 acres, at 29.688 acres, and thus credited the petitioners with such acreage.

The determination of the trial court on this subject is challenged by the appellants in one of their assignments of error. In the opinion of the learned trial judge it is said:

"One who has purchased land upon land contract is not the owner of such lands. The legal title still remains in the vendor. In this particular his relation to the title is entirely different from the case where a mortgage is given; there the mortgagor retains full legal title subject only to the lien of the mortgage. But it does not follow that the owner of the equitable title under a land contract is not an 'owner' within the meaning of that term as used in the drainage statutes. 'The word "owner" does not always mean absolute ownership; . . . the purchaser (under land contract), having a mere equitable title, may also be called the owner. The interest of the purchaser is measured by the part of the purchase money paid, and that of the vendor by the part of the purchase money unpaid, and they may properly both be called the owner.' *Edwards & McCulloch L. Co. v. Mosher,* 88 Wis. 672, 677, 678, 60 N. W. 264. The interest of Mr. Johnson in the one hundred acres remaining undeeded is 6,000-24,250, or 24.74 acres. Under the rule of the *Mosher Case* cited above, Mr. Johnson should be counted as the owner of 24.74 acres of land in the district in determining whether the petition has the requisite number of signatures."

A careful review of the authorities in this state and elsewhere convinces us that the conclusions arrived at by the trial court are correct and should be adopted.

In *Button v. Schroyer,* 5 Wis. 598, 599, in speaking of the relationship of a vendor and vendee in a land contract, this court has held:

"The relation between the parties is analogous to that of equitable mortgagor and mortgagee. The former has an equity of redemption, the latter has the correlative right of foreclosure."

In *Winslow v. Crowell,* 32 Wis. 639, it is held that where the consideration provided for in the land contract has been fully paid, the vendee becomes the equitable owner of the title, and the vendor the holder of the legal title in trust for him.

In the case of *Edwards & McCulloch L. Co. v. Mosher,* 88 Wis. 672, 677, 60 N. W. 264, it was held that:

"The purchaser, having a mere equitable title, may also be called the owner. The interest of the purchaser is measured by the part of the purchase money paid, and that of the vendor by the part of the purchase money unpaid, and they may properly both be called the owner in respect to the mechanic's lien law as in respect to fire insurance." See, also, *Krakow v. Wille,* 125 Wis. 284, 287, 103 N. W. 1121; *Church v. Smith,* 39 Wis. 492; *Kimball v. Darling,* 32 Wis. 675; *Northrup v. Trask,* 39 Wis. 515; *Superior C. L. Co. v. Nichols,* 81 Wis. 656, 51 N. W. 878.

Other authorities of this court might be cited, but suffice it to say that the holdings in all of the cases seem to be uniform and adhere to the doctrines above referred to.

The proceedings under the drainage district law are equitable in their nature (sub. 1, sec. 1379—10*c*, Stats.) and shall be liberally construed (sec. 1379—31*w*).

It therefore appears that the trial court correctly apportioned the interest of the vendee in the Johnson land contract. Such apportionment is not only equitable, but is the only logical basis upon which the interests of both vendor and vendee under the land contract may be credited in a drainage proceeding, and results in a liberal construction of the drainage act, as is contemplated by the statute.

It would be inequitable and unjust to deny the vendee, who has paid a substantial portion of the purchase price of land under a land contract, a voice in the creation of a drainage district, and to require as a prerequisite the co-operation and signature of the vendor; and it would likewise be unjust and inequitable to deny the vendor a voice without the

co-operation of the vendee. Each, in the sense indicated by the Wisconsin decisions referred to, is an owner; each has an interest in the land, and each should have a voice, in proportion to his interest, in the creation of the district.

Mrs. Farness, under the will of her deceased husband, was the owner of a life estate in 138.5 acres of land in the proposed district, the remainder being owned by her minor children. Mrs. Farness signed the petition without indicating by such signature whether she signed for herself, or for the remaindermen, or for both. She testified that in signing the petition it was her intention to represent only her own interest. Under the statute she had authority to sign for her minor children. The trial court construed her signature, under the evidence, as binding only her life estate, and it appears that the conclusion of the trial court is correct. It is not contended by appellants' counsel that Mrs. Farness is not the owner; on the contrary, her ownership of a life interest is conceded.

Under the view we have heretofore taken with respect to the right of a vendee under a land contract to be credited with his interest in the land, we are also constrained to hold that such rule is applicable to the owner of a life estate.

The trial court computed the Farness interest in accordance with the age of Mrs. Farness and the mortality tables, and as the result thereof credited the petitioners with 83.1 acres. No other method of computation is available, and no reason can be advanced why such method of computation is either unjust or inequitable. In his opinion the trial judge found:

"The benefit conferred by the drainage here in question will permanently benefit the interests of the remaindermen in the land of the Farness estate. It is a well established rule that assessments for benefits which permanently enhance the value of land should be ratably borne by the life tenant and remaindermen in proportion to the benefit accruing to each. Such apportionment, in the absence of provisions otherwise

in the statute or the instrument creating the life estate, are divided in proportion to the respective values of their estates. See cases cited in notes: 114 Am. St. Rep. 449; Ann. Cas. 1914B, 820; 10 L. R. A. N. S. 342. That rule was applied to drainage assessments in *Huston v. Tribbetts,* 171 Ill. 547, 49 N. E. 711."

In *Huston v. Tribbetts,* 171 Ill. 547 (49 N. E. 711), at page 550 it is said:

"It is not doubted that appellee, as the owner of the life estate, must pay the annual taxes assessed against the property. They are imposed as a yearly burden for the current benefits derived from the administration of the laws, the protection of property, and the general welfare. Special assessments like this, although levied through the exercise of the taxing power, are not regarded as such ordinary taxes, but as an equivalent for benefits in the increased value of the property. Cooley, Taxation, 416; *Canal Trustees v. Chicago,* 12 Ill. 403; *McLean v. Bloomington,* 106 Ill. 209. . . . The benefits for which ordinary taxes are exacted are realized from year to year, and it is just that the owner of the life estate should pay them, but they rest upon entirely different grounds from a special assessment, where the improvement is a permanent benefit to the property and to the remainder. Where the whole estate is benefited by the discharge of an incumbrance, it is to be apportioned ratably between the tenant for life and the remainderman. 4 Kent, Comm. 74. . . . Upon that principle it is held that the life tenant and remainderman are chargeable with their several portions of special assessments beneficial to each. *Peck v. Sherwood,* 56 N. Y. 615; *Plympton v. Boston Dispensary,* 106 Mass. 546; *Cairns v. Chabert,* 3 Edw. Ch. 312."

Counting the lands included in the original petition, the Falk lands, and the owners of lands who signed the supplemental petitions, and crediting the Johnson and Farness lands as above indicated, the total amount of acreage in favor of the proposed drainage district exceeds one half of the total acreage of the lands in the district, and the order of the circuit court must therefore be affirmed; and

it becomes unnecessary to determine whether the lands included in the highways or in the railroad right of way should be credited either in favor of or against the petitioners.

By the Court.—Order affirmed.

SIEB, Appellant, vs. CITY OF RACINE and others, Respondents.

February 11—April 11, 1922.

Schools: Superintendent of city schools: General charter law: Special statute: Whether officer or employee: Increase of salary during term: Trial: Affidavit of prejudice: Filed after term commences: Appeal: Equal division of appellate court.

1. Where the justices of the supreme court are equally divided in opinion—in this case on the question whether under sec. 2625, Stats., as it existed on June 10, 1921, a motion for a change of venue based upon an affidavit of prejudice of the presiding judge, presented after the term had been commenced but after a recess of one week had been taken, was timely made—the ruling of the trial court cannot be disturbed.
2. Sec. 926—115, Stats. (ch. 360, Laws 1903), providing that in all cities except those of the first class the board of education may elect a superintendent of schools for not exceeding three years, applies to the city of Racine; ch. 388, Laws 1905, amended ch. 360, Laws 1903, relative to the election of a superintendent in cities of the third class, by providing for their election by the board of education, and that the act shall apply to all such cities in which a superintendent is elected or appointed by the board, and repealed all conflicting acts. If there was any conflict between sec. 926—115 and the general charter law (sec. 925—115), which had been adopted by the city of Racine in 1905, sec. 925—115 is expressly repealed by sec. 926—115.
3. As a matter of public policy, a city superintendent of schools should not be held to be a public officer who, as required by sub. (2), sec. 62.09, Stats. 1921, in the case of city officers, must be a citizen, unless such is plainly the legislative intent; it being a matter of common knowledge that city boards of education frequently deem it for the best interests of the schools to select men for such position who are not residents of the state.

4. Under said sec. 926—115, Stats., such an appointee is not an officer, as the statute prescribes no definite term, does not require an oath, and confers no functions of sovereignty unless it be in licensing teachers, all of which are usual, if not indispensable, characteristics of an office.
5. In analogy to the rule that the salary of a public officer may be raised or diminished during his term unless forbidden by law, a city board of education may abrogate contracts with the city superintendent of schools and enter into new contracts for increased compensation; the public policy declared in sec. 26, art. IV, Const. (prohibiting the legislature from granting extra compensation to any public officer, agent, servant, or contractor after the services have been rendered or the contract entered into), being applicable only to public officers and contractors who are paid out of the state treasury, and by sec. 59.15 and sub. (6) (b), sec. 62.09, Stats. 1921, to county and city officers but not to contractors.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

This action was brought by the plaintiff in his capacity as taxpayer of the city of *Racine* to restrain the city officers from paying the defendant *Longanecker,* who is the city superintendent of schools, what is alleged to be an unlawful increase of salary.

The material facts are that the defendant *Longanecker* was elected city superintendent of schools by the board of education of the city of *Racine* on March 7, 1919, to serve for three years from August 1, 1919, at a salary of $3,500 for the first year, $3,750 for the second year, and $4,000 for the third year. On the 16th day of September, 1919, the board of education increased the salary to $4,500 per year, covering the period of his contract. On December 5, 1919, a written contract was entered into between the defendant and the board of education embodying the terms fixed on September 16th. On April 2, 1920, the board entered into a new contract with the superintendent fixing the salary at $4,750 for the year beginning August 1, 1921, and $5,000 for the succeeding year. On December 2, 1920, the defendant *Longanecker,* at the request of the board of

education, surrendered his contract then in force and expiring July 30, 1922, and a new contract was made, taking effect January 1, 1921, employing the defendant *Longanecker* as superintendent of schools at a salary of $6,000 per annum until July 30, 1923.

The trial court, upon finding the facts substantially as stated, rendered judgment in favor of the defendant, and from the judgment so rendered the plaintiff brings this appeal.

The cause was originally argued on November 17, 1921. On December 8, 1921, a reargument was ordered on the following questions:

1. Does the power and authority to license teachers constitute a function of sovereignty?

2. Should it be held that the superintendent is an officer, is he a city or school district officer?

3. If a school district officer, did the board of education have power to increase his salary or compensation?

4. If it be held that the superintendent is an employee, did the board of education have power to modify the contract of employment by increasing his compensation; or, in other words, was its power in that respect exhausted when it entered into the initial contract?

For the appellant there were briefs by *Hand & Quinn* of Racine, and oral argument by *E. B. Hand.*

For the respondent *Longanecker* there was a brief by *Simmons & Walker* of Racine, and oral argument by *John B. Simmons.*

OWEN, J. The case was upon the calendar of the circuit court for the term commencing on April 11, 1921. On May 13th the jury was excused. During the week beginning May 30th no session of the court was held. Sessions were resumed on June 6th. On that day the plaintiff moved for a change of venue, based upon an affidavit of the prejudice of the presiding judge. The court denied the motion,

holding that it should have been made on the first day of the term, and could not be made thereafter. The motion was renewed and a like ruling made on June 10th. The appellant assigned the denial of the motion as error.

The statute then in force (sec. 2625) required the affidavit of prejudice to be filed "on or before the first day of the term, or of the resumed session thereof, at which the case is triable." The appellant contends that the session of the court held on the 6th day of June was a "resumed session" within the meaning of the statute. What is meant by the term "resumed session" is certainly a matter of great doubt. It is a question upon which we are equally divided. In a certain sense there is a resumed session every day that the court sits, but, obviously, the legislature did not have in mind the sessions occurring from day to day, as in such case there would be no point in requiring the affidavit to be filed on the first day of the term. Formerly a case could be put on the calendar only by a notice of trial served ten days prior to the term, but by ch. 592, Laws 1913 (sec. 113.09, Stats. 1921), a case can be noticed for trial at any time after issue joined and put upon the current calendar upon ten days' previous notice. Respondent contends that the provision has reference to such cases, and as to such cases only permits the affidavit to be filed at the first session of the court after the expiration of the prescribed notice. This contention would seem to be shattered by the fact that the legislature, by ch. 428, Laws 1921, specifically provided that "if the case is not noticed for trial in time to be placed upon the calendar at the commencement of the term then [the affidavit may be filed] within ten days after the case is noticed for trial." This amendment was wholly unnecessary if this section, as it stood prior to the amendment, is to be interpreted in accordance with respondent's contention. The section as it now stands provides that the affidavit shall be filed "on or before the first day of the term, or of the resumed session thereof, at which the case is triable, or

if the case is not noticed for trial in time to be placed upon the calendar at the commencement of the term then within ten days after the case is noticed for trial."

It is difficult to give the phrase "or of the resumed session thereof" any meaning without destroying the requirement that the affidavit be filed on the first day of the term, or rendering entirely superfluous the amendment supplied by ch. 428 of the Laws of 1921. As already stated, we are equally divided in our views as to whether the affidavit was timely filed, the result being that the ruling of the court in that respect cannot be disturbed. We suggest, however, that the situation affords possibilities for legislative clarification.

Coming to the merits of the controversy, it is conceded that the board of education, with reference to the transaction here involved, pretended to act in pursuance of the provisions of sec. 926—115, Stats. 1919, which provides as follows:

"In all cities except cities of the first class, there may be elected by the board of education or the board of school commissioners, a city superintendent of schools for a term not to exceed three years, whose duties shall be: (1) To examine and license teachers according to the statutes; (2) To supervise the administration of the courses of study; (3) To have general supervision of the professional work of the schools of the city, including the holding of teachers' meetings and the promotion of pupils; (4) From time to time to make a written report to the board of education or board of school commissioners, as the case may be, embodying such recommendations relative to the employment of teachers, adoption of text-books, changes in the course of study, enforcement of discipline, and such other matters as said superintendent may deem for the best interests and welfare of the city schools; (5) To make such other reports and to perform such other duties as the board of education or board of school commissioners may direct and which are not in conflict with the provisions of this act. The board of education or the board of school commissioners shall deter-

mine the annual compensation to be paid said city superintendent of public schools from the school funds of the city."

It is claimed by appellant that this provision is not applicable to the city of *Racine,* and that the power of the board of education to elect a superintendent of schools is referable to sec. 925—115, Stats. 1919 (general charter law), which provides that the superintendent of schools shall hold his office for one year and until his successor shall have been elected. If the power of the board of education in this respect is referable to the latter section, then it is plain that they could not elect a superintendent of schools for a longer term than one year, and that their contract with him for three years was void.

On the 30th day of September, 1905, the city council of *Racine* adopted certain subchapters to the general charter law, among which was ch. 14, relating to schools, which included sec. 925—115. Sec. 926—115 was originated by ch. 360, Laws 1903, which was an act "to prescribe and limit the duties and qualifications of city superintendent of schools in cities of the third class and to provide for his appointment," etc. Said ch. 360, Laws 1903, was amended by ch. 388, Laws 1905, so as to provide for the election of a city superintendent of schools in all cities except cities of the first class by the board of education, and it was specifically provided therein that the act should apply to all cities except those of the first class in which a superintendent was elected or appointed by the board of education. It was also provided that "all acts and parts of acts in conflict with this act are hereby repealed."

Appellant contends that the enactment relates only to cities organized or operating under special charters, and has no application to cities operating under that portion of the general charter law relating to schools. This would seem to be a difficult contention to maintain in view of the express language of the enactment (ch. 388, Laws 1905) that the act shall apply to all cities except those of the first class.

However, it has been repeatedly held by this court that similar statutes are of general application, and the matter need not be discussed further. It is settled against appellant's contentions by *Superior v. Industrial Comm.* 160 Wis. 541, 152 N. W. 151; *State ex rel. Gillen v. Braman,* 173 Wis. 596, 181 N. W. 729. If there is any conflict between sec. 926—115 and sec. 925—115 the latter is repealed by the former, not by implication but by express declaration. We therefore conclude that the board of education was authorized to elect a superintendent of schools for a period not exceeding three years.

The question now arises whether, having entered into a contract with the city superintendent for a definite period, it was competent for the board of education during such period to relieve him from the terms of his contract of employment and to enter into another contract with him covering the same or a portion of the period affected by the preceding contract, at a higher rate of compensation. A great deal of discussion has been indulged as to whether the character of the employment of the superintendent of schools constitutes him an officer or a mere employee. As a matter of public policy a city superintendent of schools should not be held to be a public officer unless such plainly appears to be the legislative intent. In this state a public officer must be a citizen. *State ex rel. Off v. Smith,* 14 Wis. 497; *State ex rel. Schuet v. Murray,* 28 Wis. 96. This is a statutory requirement as to city officers. Sub. (2), sec. 62.09. City boards of education would be greatly hampered in procuring competent superintendents if their selections were confined to citizens of the city or even of the state. It is matter of common knowledge that such bodies frequently deem it for the best interests of the schools of their cities to select men for the position who are not residents of the state. It is quite apparent that the best interests of the schools suggest great freedom of action on the part of the board of education in selecting the superintendent, and it is not to

be inferred that the legislature intended to hamper the board of education in its discharge of this important duty.

The question whether a given employment constitutes the one selected for its discharge an officer or a mere employee is often a difficult one. The line between the two is frequently shadowy and difficult to trace. In examining sec. 926—115, however, we find an absence of many of the recognized characteristics of an office. There is no definite term; the appointee is not required to take an oath; he exercises none of the functions of sovereignty, unless it be in the matter of licensing teachers. While, possibly, these are not indispensable, they are usual characteristics of an office. Whether the legislature intended to constitute the position an office is at least doubtful. In view of the considerations stated, we are disposed to and do hold that the city superintendent of schools was not an officer.

The final question, then, is whether the board of education had power to modify its contract with the superintendent. Sec. 26 of art. IV of the state constitution prohibits the legislature from granting any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into. This declares a wise public policy. It may be stated as a general proposition that those charged with authority and responsibility in the management of public affairs should not be permitted to deny the public the benefits of an advantageous contract. There is much reason in the view that the contract entered into between the board of education and the superintendent constituted something of value which belonged not to the board of education but to the city; that the board of education, having only such powers and authority as are delegated to it either expressly or by implication, was without power to surrender or give away the thing of value represented in the contract. However, it seems to be generally recognized that, unless forbidden by law, the salary of a public officer

may be changed from time to time even during the continuance of his term. 2 McQuillin, Mun. Corp. § 528; *State ex rel. Martin v. Kalb,* 50 Wis. 178, 6 N. W. 557; *Kollock v. Dodge,* 105 Wis. 187, 80 N. W. 608. It has been held that the constitutional provision referred to applies only to public officers whose salaries are paid out of the state treasury. *Milwaukee Co. v. Hackett,* 21 Wis. 613; *State ex rel. Martin v. Kalb,* 50 Wis. 178, 6 N. W. 557; *State ex rel. Sommer v. Erickson,* 120 Wis. 435, 98 N. W. 253. Such being the limit of its application so far as officers are concerned, it follows that it applies only to contractors who are paid out of the state treasury. The public policy prompting the constitutional provision is made applicable to county and city officers by express statutory enactment. Sec. 59.15; sub. (6) (b), sec. 62.09, Stats. However, there is no similar provision applicable to county or city contracts, and in analogy to the rule that the salary of officers may be raised or diminished in the absence of law forbidding the same, it must be held that it is competent for city authorities having the power to contract with employees to consent to an abolition of their existing contracts and to provide for an increase of their compensation during the period for which they are under a contract of employment.

Our conclusion, therefore, is that it was competent for the board of education to abrogate the various contracts set forth in the statement of facts and to enter into new contracts with the superintendent affording him higher compensation, and that the appellant is not entitled to the relief asked.

By the Court.—Judgment affirmed.

SUPERIOR WATER, LIGHT & POWER COMPANY, Appellant, vs. CITY OF SUPERIOR and others, Respondents.

March 4—April 11, 1922.

Appeal: Demurrer: Leave to plead over: Judgment on failure to plead.

Where, after a demurrer to a complaint, overruled in the circuit court, was sustained on appeal, and upon remanding the record the circuit court granted leave to amend within twenty days, and upon failure of plaintiff to plead over entered final judgment dismissing the complaint, the judgment will be affirmed, the proceedings being regular and in accordance with proper practice.

APPEAL from a judgment of the circuit court for Douglas county: G. N. RISJORD, Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Grace, Fridley & Crawford* of Superior, attorneys, and *Harry L. Butler* of Madison, of counsel, and for the respondents on that of *T. L. McIntosh* and *R. M. Rieser,* both of Superior.

JONES, J. On October 8, 1918, the council of the city of *Superior* passed a resolution declaring the intention of the city to take over the property of the *Superior Water, Light & Power Company* in accordance with the public utility law. Thereupon the company brought suit to enjoin the city from so doing. From an order overruling a demurrer to the complaint the city appealed to this court. The court reversed the order overruling the demurrer and remanded the case with directions to sustain the demurrer. 174 Wis. 257, 181 N. W. 113. Plaintiff filed a motion for a rehearing, which was ordered on one of the questions involved. A reargument was had, and thereafter, on May 31, 1921, the court rendered a decision sustaining its previous mandate. 174 Wis. 257, at p. 292 (183 N. W. 254). Upon the remanding of the record the circuit court entered

an order sustaining the demurrer, with leave to amend the complaint within twenty days. The plaintiff not pleading over, final judgment was entered sustaining the demurrer and dismissing the complaint. The present appeal is from this judgment.

From an examination of the record it appears that the proceedings in the court below were regular and in accordance with the proper practice, and the judgment as entered should be affirmed.

By the Court.—Judgment affirmed.

SEDERLUND, Appellant, vs. SEDERLUND and others, Respondents.

March 14—April 11, 1922.

Deeds: Conveyance by parent to child: Fraud on wife subsequently married: Descent and distribution: Transfers by husband to avoid wife's rights.

1. Deeds executed by a father to his children six years prior to his death and actually delivered to them, who handed them back to the father for safe-keeping, are valid as against the father's second wife, with whom he did not become acquainted until two years after the execution of such deeds, but who claimed the deeds were fraudulent as to her dower and homestead rights, though the father retained possession of the lands or leased them to his children.
2. A deed containing a provision that the conveyance was to take effect in the future upon the happening of a particular event, such as the death of the grantor, is valid; and in this case there was a completed delivery, transferring the title to the children, which could not be divested except by a transfer from them or one resulting by operation of law.
3. A wife has no vested or *quasi*-vested right in the husband's personal property during his lifetime, and he may dispose thereof voluntarily, though for the purpose of defeating the wife's right as widow, provided the disposition is not indicative of some other fraud on her than that arising from his absolute transfer of property to avoid her having an interest therein after his death.

4. Where a husband makes a colorable transfer of his personal property to another under such circumstances as would in law still leave the title in himself, the transfer will be deemed fraudulent as to the wife's right as a widow, and may be set aside at her instance.
5. During coverture the husband owes the duty of reasonable maintenance and support towards his wife, and a transfer of his personal property for the purpose of avoiding such obligation will be set aside during the lifetime of the husband at the instance of the wife.
6. A husband's transfer of his personal property, representing the earnings of himself and his former wife and their children, to such children at a time when he was able to be about and to transact business, though suffering from an incurable disease, is valid as against his second wife, to whom he had been married only a short time, in the absence of proof as to undue influence and in view of the fact that he had transferred a portion of the property to the wife.

APPEAL from a judgment of the circuit court for Polk county: W. R. FOLEY, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing the plaintiff's complaint, with costs.

The plaintiff, the widow of one S. A. Sederlund, began this action against the defendants, four of his children by a prior marriage, to set aside certain transfers of real estate and assignments of personal property made by the deceased for the benefit of said children, and to recover dower and homestead rights in said real estate and the widow's distributive share in the personal property.

An examination of the record discloses the following facts, which are also substantially found by the court in its findings:

That in the year 1912 Sederlund, then a widower, was the father of nine children, the four youngest of whom were respectively of the following ages: *Olga* 8, *David* 12, *Ruth* 17, and *Carl Alfred* 22. At that time he went to Grantsburg, the county seat of an adjoining county, and had the register of deeds of such county prepare legal conveyances of all of his real estate, consisting of 240 acres of land, to

said four children, as follows, to wit: To *Carl* eighty acres; to *Ruth* eighty acres; and to *David* and *Olga* eighty acres. The deeds were then executed and handed to the children, who took them home and then delivered them to the father for safe-keeping, the latter keeping them in his safe. After this the deceased continued to occupy the lands or leased them to his boys and paid all taxes. There is evidence that there was an understanding at the time the deeds were made that the father would act as the guardian for the children and would look after the real estate during his lifetime.

On or about the 28th day of November, 1917, Sederlund, while in full possession of his mental faculties and without any undue influence having been exercised over his mind, handed these deeds to the respective grantees therein mentioned, so that they might record the same, and the deeds were thereupon duly recorded.

Sederlund first became acquainted with the plaintiff in the year 1914, being two years after the execution and delivery of said deeds, and the parties were married on August 10, 1915. Sederlund died on February 8, 1918, being then fifty-eight years of age, and having prior to his death, for a period of about one year, been afflicted with cancer of the stomach. Ella, the issue of the marriage of the deceased with the plaintiff, was born October 7, 1917.

In September, 1917, Sederlund transferred, by a bill of sale and by assignments, personal property consisting of live stock, farming implements, etc., and real-estate mortgages, to his children and widow, as follows: One note and mortgage of $1,000 to his son Elmer; one note and mortgage of $300 to his son *Alfred,* one note and mortgage of $1,100 to his sons *Carl* and Elmer; one note and mortgage of $500 to his daughter Girda; one note and mortgage of $1,500 to his son Martin; one note and mortgage of $1,050 to his son and daughter Martin and Esther; one note and mortgage of $300 to his daughter *Ruth;* one note and mortgage of $1,175 to his son and daughter *David* and *Olga;* one note

and mortgage of $750 to the plaintiff and her child, Ella; and a bill of sale of the live stock, etc., to his son and daughter *David* and *Ruth*, the total amount of the notes and mortgages so transferred aggregating $7,725.

The action was brought against the four defendants, they being the only children of the deceased by a prior marriage who were residents of Wisconsin, on the ground alleged in the complaint that such transfers of real estate and assignments of personal property were fraudulent as to the plaintiff and were designed to defeat plaintiff's dower and homestead rights in the real estate and to deprive her of her distributive share in the personal property.

For the appellant there was a brief by *Clarence C. Coe* and *Arthur E. Coe*, both of Barron, and oral argument by *Clarence C. Coe*.

For the respondents there was a brief by *Kennedy & Yates* of Amery, and oral argument by *W. T. Kennedy*.

DOERFLER, J. That the court erred in finding that the deeds to the real estate were delivered prior to Sederlund's marriage to the plaintiff, and that such transfers were in fraud of plaintiff's rights, constitutes appellant's first assignment of error.

With respect to the real estate transfers the court found:

"That on the 2d day of September, 1912, the said S. A. Sederlund made, executed, and delivered the several deeds of the lands described in the complaint, which were all the lands then owned by him, to the several children, the defendants in this action. That said deeds were so made, executed, and delivered in consideration of love and affection and as a voluntary gift *inter vivos* to the said defendants. That there was no fraud, undue influence, or contemplation of marriage at that time. . . . That said several deeds were fully executed and delivered beyond the power of the said Sederlund to recall the same."

The above findings are amply supported by the evidence.

In *Jones v. Caird,* 153 Wis. 384, 386, 141 N. W. 228, this court held, Mr. Justice TIMLIN writing the opinion:

"When a father executes and causes to be recorded in the register's office a deed of his land to his infant child, brings this to the knowledge of the child, and the grant is beneficial to the infant, and the latter thereafter makes claim for the land under the deed, its acceptance is presumed and the delivery is complete." Citing *Whiting v. Hoglund,* 127 Wis. 135, 106 N. W. 391; *Cooper v. Jackson,* 4 Wis. 537; *Cerney v. Pawlot,* 66 Wis. 262, 28 N. W. 183.

In the instant case the deeds in question were prepared and executed six years prior to the grantor's death and two years prior to the time when he first became acquainted with the plaintiff, and the evidence is undisputed that these deeds were actually delivered to the defendants and retained by them until they arrived at their home, when they were handed to the deceased for safe-keeping, and such deeds were actually, in the fall of 1917, recorded in the office of the proper register of deeds. The instant case is stronger than the *Jones Case* above cited, for in the latter case there does not appear to have been an actual delivery, but a constructive delivery only, as evidenced by the recording of the deed, while in the case at bar there was an undisputed actual delivery combined with a subsequent recording. The mere fact that the deceased during his lifetime remained in possession of the lands or leased them to his children cannot, in the absence of fraud, operate against the validity of these deeds. There is evidence to show that it was understood that the deceased was to act as guardian for the children and that he would look after the real estate during his lifetime. Had the deed, however, contained a provision that the conveyance in fee was to take effect in the future, upon the happening of a particular event—for instance, the death of the grantor,—such conveyance would nevertheless be a valid one in this state. *Ferguson v. Mason,* 60 Wis. 377, 19

N. W. 420; *Jones v. Caird,* 153 Wis. 384, 387, 141 N. W. 228.

In *Rogers v. Rogers,* 53 Wis. 36, 10 N. W. 2, it was held that if a grantor did not wish his deed to go into effect at once he should keep it to himself or place it in the hands of a stranger, and not deliver it to the grantee.

The deeds in the instant case having been delivered to the grantees and having been accepted by them, such delivery completes the transfer, and the title of the grantees cannot be divested except by a transfer from them or one resulting by operation of law. The very act of delivering these deeds to the grantees could have no other object or purpose than to meet the requirements of the law in an effort on the part of the grantor to transfer title. Even the voluntary destruction, by consent of both parties, of these deeds would not have operated to restore the title of the property to the grantor. *Parker v. Kane,* 4 Wis. 1, 12; *Wilke v. Wilke,* 28 Wis. 296; *Lampe v. Kennedy,* 56 Wis. 249, 14 N. W. 43.

"The time at which a man transfers his property before marriage is material in determining whether it can be deemed a fraud on the future wife's marital rights. To render it invalid it must as a general rule have been made in contemplation of the marriage, therefore if it was made before courtship or engagement, and not in contemplation of the marriage, no claim that a fraud upon the future wife's marital right was perpetrated can be sustained. . . . The relation of the beneficiaries of the transfer to the husband is most material in determining whether it is to be considered as a fraud on the future wife's rights. If the transfer is meritorious, viz. for the benefit of those having claims on the grantor, as where it is made to or for the benefit of the minor children of the grantor by a former wife, . . . it should not in the absence of any other indicia of fraud be deemed fraudulent as regards the future wife." 13 Ruling Case Law, p. 1083, §§ 106, 107.

There is no evidence in this case to show that when these real-estate transfers were made the deceased contemplated marriage. In fact he did not become acquainted with the

plaintiff until two years thereafter. Under the law above cited such transfers could in no event be deemed fraudulent as to the rights of the plaintiff. The court so found, and such finding is fully supported by the evidence.

On appellant's first assignment of error the holding of this court is therefore adverse to her contention.

By appellant's second assignment of error she contends that the transfer of the personal property to the children was invalid as against the widow's rights and was in fraud of her rights.

A statement will be found in 13 Ruling Case Law, p. 1087, § 111, that:

"Under statutes . . . in many jurisdictions, the wife is entitled to share in the distribution of her husband's estate or is given a share therein after the payment of the decedent's debts, of which she cannot be deprived by the will of the decedent, and according to some authorities it has been held that a voluntary transfer or gift by a husband of his personalty in contemplation of his death and to defeat his wife's interest under the statutes is a fraud on her rights and may be set aside at her instance."

The general rule, and the one adopted by the majority of the courts, as set forth in said sec. 111, is as follows:

"According to the great weight of authority, however, the view is taken that the interest of the wife as a statutory heir or distributee is on the same footing as that of children, that she has no vested or *quasi*-vested right in the husband's property during his lifetime, and that he may dispose of his property voluntarily though for the purpose of defeating the wife's right as widow, provided the disposition is not colorable merely and is not indicative of some other fraud on her than that arising from his absolute transfer of property to avoid her having an interest therein after his death."

Where a husband, therefore, prior to his death makes a colorable transfer of his personal property to another under such circumstances as would in law still retain the title in himself, such transfer will be deemed a fraudulent transfer as to the wife's rights as a widow and may be set

aside at her instance. During coverture the husband owes a duty of reasonable maintenance and support towards his wife, and a transfer of his property, designed for the purpose of avoiding such obligation, will be set aside during the lifetime of the husband, at the instance of the wife.

Under the statutes of this state the husband is prohibited from incumbering or transferring his homestead without the signature of his wife. The wife also has inchoate rights of dower. The wife cannot be deprived of such rights by the husband without her consent. As to personal property, however, the situation is radically different. With the exception of the restrictions above referred to, a husband has the absolute right during his lifetime to make absolute disposition of his personal property as he deems fit, the wife having no vested or *quasi*-vested interest in such property. True, under the statutes of our state as they existed at the time of the assignments with respect to the personal property, certain provisions are made for the benefit of a widow which she is authorized to claim, and which she is entitled to, whether the husband dies testate or intestate. She is also entitled, under sub. (6), sec. 3935, Stats., in case of intestacy, to an equal share in the residue of the personal property with a child of the deceased, provided such deceased leaves but one child surviving him, and in all other instances she is entitled to one third of such residue. It is evident that these statutes are designed to enable the widow to obtain, in any event, such share of the estate of the deceased as the legislature deemed reasonable. The statute is a beneficent one and recognizes the rights of a widow resulting from the obligations of marriage.

Where, therefore, a husband, shortly before his death, purports to transfer all or the greater portion of his property to others, which transfer has a tendency to frustrate the beneficent design of the statute with respect to a wife's distributive share in her husband's personal property, the amount of proof necessary to stamp such a transfer as

fraudulent depends in every instance upon the particular facts existing in each case. In the instant case it would appear that the transfer was not made secretly, nor was it made pursuant to undue influence exercised upon the mind of the deceased by the defendants. While the deceased at the time of the assignments was suffering from an incurable disease, nevertheless such assignments were made while the deceased was still able to be about and to transact business. There is no evidence in the case that undue influence was exerted. While the amount allotted plaintiff is disproportionate to that which she would have been entitled to had such assignments not been made, in view of the law as above cited, and in view of the findings of the lower court, we cannot say that such assignments were the product of fraudulent designs engendered by the defendants and made manifest by the final disposition. The deceased clearly had in mind a moral obligation, and solved that obligation from his viewpoint. The parties had been married but a short period of time, and the property distributed represents the earnings of the deceased and his former wife and their children.

We therefore hold that such assignments of personal property were not fraudulent as to the plaintiff.

The judgment of the lower court is therefore affirmed.

By the Court.—It is so ordered.

WESTGARD, Administratrix, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 14—April 11, 1922.

Federal employers' liability: Duty of master to use safe appliances: Burden of showing proximate cause.

1. An employer must exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of his employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe.
2. The federal Employers' Liability Act does not give a new cause of action which did not exist at common law, but modified the common-law rule with respect to the defenses of contributory negligence, assumption of risk, and negligence of a fellow-servant; and under the federal Safety Appliance Act an injured employee, to recover, must show that the improper equipment was the proximate cause of his injury.
3. A cake of ice had slipped from a slide leading from an ice-house to a refrigerator car which was being loaded, and came to rest on the top of the car instead of on the running-board, whereupon an employee proceeded to drag it to the ice bunker, and after he had moved it six or eight feet, in some unexplained way he lost his hold, fell off the car, and was killed. *Held,* even if the slide were insufficient, there was no causal connection between such insufficiency and the injuries of the deceased.

OWEN, J., dissents.

APPEAL from an order of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Reversed.*

Personal injury. This action was brought by the plaintiff to recover damages for the wrongful death of the deceased, Andrew Westgard, which death was claimed to be due to the negligence of the defendant. There is no dispute but that the rights of the parties are controlled by the federal Employers' Liability Act.

The deceased, Andrew Westgard, was in the employ of the defendant as a section laborer, and among other duties he was called upon to perform was to assist in the icing of

cars. On May 14, 1920, the deceased was so engaged. The track upon which the car was standing ran east and west. The icehouse from which the ice was taken was on the south side of the track. The car was spotted so that the middle of the car was about opposite the door of the icehouse, the platform of the icehouse being about on a level with the running-board on the top of the car. The work was customarily performed by taking cakes of ice on the platform of the icehouse, letting down a slide which was about eight feet eleven inches long, and at the time of the accident was twenty-nine inches wide. The running-board on the car was about eighteen to twenty-two inches wide and projected up from the roof of the car about two and seven-eighths inches. The slide was on hinges and dropped down so as to connect the platform of the icehouse with the running-board on the top of the car. There were four ice bunkers, two on each end of the car. The platform connected with the icehouse was sixteen feet and three inches long and from five to six feet in width. The roof of the refrigerator car was sloping so that the distance between the slide and the roof of the car at the point where it was nearest to the icehouse was greater than the distance between the slide and the roof of the car at the running-board, the roof of the car being sloping. The deceased attempted to pull a cake of ice from the platform attached to the icehouse along the slide to the running-board on the top of the car. The cake slid off from the slide onto the roof of the car. After it had come to a rest on the roof of the car the deceased started to drag the ice on the roof of the car, and had dragged it six or eight feet when in some way not explained he lost his hold, fell backwards off the car, striking a pile of ties, and receiving injuries from which he later died. The piece of ice was about twenty to twenty-four inches thick and weighed between three and four hundred pounds.

It is the claim of the plaintiff that the slide was defective in that it should have had guides or guards on its edge so as

to keep the cake of ice from leaving the slide on its way to the running-board. The jury found:

First. That the slide furnished by the defendant for conveying ice from the icehouse to the refrigerator car was reasonably sufficient for that purpose.

Fourth. That the deceased did not assume the risk of accident.

Fifth. That the deceased was not guilty of any want of ordinary care proximately contributing to his death, and assessed the damages at the sum of $7,000.

The defendant moved for judgment upon the verdict. The plaintiff moved to set aside the verdict and for a new trial, and from an order granted on plaintiff's motion setting aside the verdict and granting a new trial the defendant appeals.

For the appellant there was a brief by *H. J. Killilea* and *Rodger M. Trump,* both of Milwaukee, and oral argument by *Mr. Trump.*

J. M. Becker of Monroe, for the respondent.

ROSENBERRY, J. The federal Employers' Liability Act provides that there may be a recovery "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The first question of the special verdict was: "Was the slide furnished by the defendant for conveying ice from the icehouse to the refrigerator car reasonably sufficient for that purpose?"

The court instructed the jury:

"It was not necessary for the defendant to furnish appliances and equipment for doing this work of the best or safest or most perfect kind. It fully complied with its duties if the slide that it furnished for conveying the ice from the icehouse to the car was reasonably sufficient for that purpose. The burden of proof is upon the negative,

and you must therefore be convinced by the evidence to a reasonable certainty that it was not reasonably sufficient in order to answer in the negative; otherwise you should answer it in the affirmative."

In granting the motion for a new trial the court said:

"An appliance may be suitable and reasonably sufficient as an instrument to accomplish a certain end; but to be 'sufficient' within the meaning of the law of negligence it must at the same time be reasonably safe. The instructions left the jury entirely in the dark on that subject, and it is very likely that they understood the term as commonly used instead of in its broader signification as used in the statute. The question referred to would in fact strongly tend to mislead the jury unless it was made clear by suitable instructions that to be 'reasonably sufficient' the appliance must not only be fairly adequate for doing the work, but that it must be reasonably safe for those using it as an instrumentality."

And because the jury were not so instructed the court set aside the verdict and granted a new trial. The defendant contends that the court erred in so doing. The rule of law is that the employer is under duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe. *Chicago & N. W. R. Co. v. Bower,* 241 U. S. 470, at p. 473 (36 Sup. Ct. 624). See, also, *Sea Board Air Line Ry. v. Horton,* 233 U. S. 492, at p. 501 (34 Sup. Ct. 635). We do not determine whether the court erred in setting aside the verdict on the ground stated. The order must be reversed on other grounds.

The sole question litigated upon the trial was the sufficiency of the appliance. The allegations of the complaint were

"that said trap platform [ice slide] was too narrow, defective and warped at one corner thereof where it lay on the roof of the car, thus producing an uneven, defective,

and too narrow platform upon which to slide ice cakes on to the foot-board of the car."

"That said injury which resulted in death was caused wholly by negligence and carelessness of the defendant and its officers, agents, and servants in not providing a suitable and safe place to work and in not applying suitable and safe tools, appliances, and equipment with which to do said work, and by negligently failing and neglecting to use pinch-bars in order to set its refrigerator car with its open pockets nearer in direct line with its trap platform, thereby avoiding the necessity of sliding ice cakes a considerable distance on the running-board to the open pockets at the end of the car."

The plaintiff contends that under the law of Wisconsin it is the duty of the employer to furnish his employees a reasonably safe place in which to work and to supply him with reasonably safe appliances. In *Sea Board Air Line Ry. v. Horton,* 233 U. S. 492, 34 Sup. Ct. 635, speaking of the instructions of the trial court in that case, the court said:

"In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for the doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded." Page 501.

In *Sea Board Air Line Ry. v. Horton, supra,* it is stated that Congress, in enacting the federal Employers' Liability Act, intended to and did base the action upon negligence only, and excluded responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence.

It is the contention of the defendant that the insufficiency complained of was not the proximate cause of the injuries sustained by the deceased and for that reason the plaintiff cannot recover. This proposition is met by the plaintiff with

the claim that under the federal Employers' Liability Act, giving to a railway employee engaged in interstate commerce the right to recover for injury or death resulting in whole or in part from the negligence of the railway company, the common-law rule as to proximate cause has no relevancy, it being sufficient that the defect contributed in any manner to cause the injury, citing *Calhoun v. G. N. R. Co.* 162 Wis. 264, 156 N. W. 198, which was affirmed in *Sullivan v. M., St. P. & S. S. M. R. Co.* 167 Wis. 518, 167 N. W. 311. The statement in *Calhoun v. G. N. R. Co.* is supported by reference to *Alexander v. M., St. P. & S. S. M. R. Co.* 156 Wis. 477, 146 N. W. 510. It is there said:

"Under this statute [sec. 1810] if the want of a fence contributes in any manner to cause the injury the defendant is liable. The ordinary rules relative to proximate cause are not applicable," citing *Atkinson v. C. & N. W. R. Co.* 119 Wis. 176, 96 N. W. 529.

In *Atkinson v. C. & N. W. R. Co., supra,* a gate had been left open by third parties with the knowledge of the section foreman. He did not close the gate nor did he return the following day. The plaintiff's horse walked through the open gate upon the right of way and was killed. The court says:

"Neither does the statute limit the company's liability to cases where an ordinarily prudent person might have anticipated that animals would probably enter upon the right of way, but imposes absolute liability for any which do enter by reason either of failure to fence or of negligent failure to maintain fence, subject only to defense of contributory negligence in the latter case. The lawmakers have legislatively assumed the probability that animals will enter on a railroad which is fenced either inadequately or not at all, and dispensed with the necessity of a finding that an ordinarily prudent man would anticipate such event. The railway company is subjected to the duty of fencing not alone for the benefit of the adjoining owner, but of the public at large."

In the *Atkinson Case* it was held that that element of proximate cause which is denominated in this state "reasonable anticipation" has no application where an injury sustained is due in whole or in part to the failure of the party complained of to comply with the provisions of the penal statute. But this does not mean that in such cases there need be no causal connection between the violation of the statute and the injuries sustained. *Steinkrause v. Eckstein,* 170 Wis. 487, 175 N. W. 988, and cases cited.

The federal Employers' Liability Act does not give a new cause of action which did not exist at common law, but modified the common-law rule with respect to the defenses of contributory negligence, assumption of risk, and negligence of fellow-servant. *Garrett v. L. & N. R. Co.* 197 Fed. 715; *Burnett v. A. C. L. R. Co.* 163 N. C. 186, 79 S. E. 414.

Under the federal Safety Appliance Act it has been held that an employee, in order to recover where he has been injured while using equipment not complying with the terms of the statute, must show that the improper equipment or the absence of proper equipment was the proximate cause of his injury, and that the burden of proof is upon him to show that fact. *St. Louis, I. M. & S. R. Co. v. McWhirter,* 229 U. S. 265, 33 Sup. Ct. 858. See, also, *Voelker v. C., M. & St. P. R. Co.* 116 Fed. 867; *Erie R. Co. v. Russell,* 183 Fed. 722; *Briggs v. C. & N. W. R. Co.* 125 Fed. 745; Thornton, Federal Liability of Railroads (3d ed.) § 307; *Clark v. Erie R. Co.* 230 Fed. 478; *Virginian R. Co. v. Linkous,* 230 Fed. 88; *Spokane & I. E. R. Co. v. Campbell,* 241 U. S. 497, 509, 36 Sup. Ct. 683; *Spokane & I. E. R. Co. v. Campbell,* 217 Fed. 518; *Tremelling v. Southern Pac. Co.* 51 Utah, 189, 170 Pac. 80; *Baltimore & O. R. Co. v. Wilson,* 242 U. S. 295, 37 Sup. Ct. 123; *Bjornsen v. N. P. R. Co.* 84 Wash. 220, 146 Pac. 575.

In this case the cake of ice had slipped from the ice slide to the top of the car, where it had remained at rest. Thereafter the deceased proceeded to drag it diagonally along the

top of the car in the direction of the ice bunker and had proceeded between six and eight feet when the accident happened. The exact cause of the accident is not disclosed by the evidence. It is possible that the deceased stumbled, that his ice tongs slipped, or that the ice into which the tongs were hooked gave way; but whatever the cause, the slipping of the cake from the ice slide to the top of the car, a thing of not infrequent occurrence, did not operate to produce the injuries complained of. Therefore, the insufficiency of the slide, if it be assumed that there was such (and we do not so hold), did not contribute to the injuries of the deceased either in whole or in part. There was no causal connection between the two.

It can be argued that if the guide had been in the slide and the cake of ice had not fallen to the roof of the car the deceased might not have been injured and therefore a jury question is presented. Such an argument not only throws the whole question into the field of doubt and speculation, but ignores the established fact that at the time of the injury the negligence complained of had ceased to operate. The fall of the ice to the roof of the car had no consequences which contributed to the fall of the deceased. If the fall had thrown the deceased to the ground, or in endeavoring to prevent the fall of the ice or while trying to stop its fall the deceased had sustained injuries, there would have been a causal connection between the claimed negligence of the defendant and the injuries sustained. But where the cake of ice had come to rest and it had thereafter been moved to another place six or eight feet distant where the accident happened, how can it be said there is any connection between the negligence of the defendant and the injury sustained? Even if it be argued that the ice was on the wrong side of the running-board and that the deceased was trying to move it over the running-board, there is not the slightest evidence to show that the accident was due to that fact. The ice might have broken, the tongs might have slipped, or the

deceased might have stumbled just as well on one side as the other. The real cause of the unfortunate injury will never be known. Whatever it was, it was not the alleged defective condition of the slide. The mere fact that a movement of the cake of ice due to the alleged defect was one of a series of movements which preceded the accident does not establish a causal connection between the movement and the injury. In *Derr v. C., M. & St. P. R. Co.* 163 Wis. 234, 157 N. W. 753, if the plaintiff had not driven an unlicensed car he would not have been at the place of accident at the time he sustained the injuries complained of; yet it was held there was no causal relation. In *Benesch v. Pagel,* 171 Wis. 620, 177 N. W. 861, it was held that the fact that the plaintiff was driving in violation of law did not prevent recovery, there being no causal relation between the fact that the plaintiff was under sixteen and unaccompanied and the injury sustained. See *Haswell v. Reuter,* 171 Wis. 228, 177 N. W. 8.

There being no causal connection between the negligence complained of and the injury sustained, the defendant's motion for judgment dismissing the complaint should have been granted.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to enter judgment dismissing the complaint upon the merits.

OWEN, J. (*dissenting*). I think the motion for a new trial was properly granted. The charge of the court was subject to the criticism expressed by the trial judge, in my opinion. It seems reasonably clear to me that the plaintiff was entitled to have the question of the sufficiency of the appliance, referred to as the slide, submitted to the jury under proper instructions. The work of transporting the ice from the icehouse to the bunker was a simple operation unattended with any great hazard when everything went according to plan. The ice was let down from the platform

to the running-board on top of the car by means of the slide. When once on the running-board it was transported to the bunker. But in the instance here under consideration the ice slipped from the slide onto the slanting roof of the car. While if the deceased had permitted the ice to slide from the car to the ground the unfortunate accident would not have occurred, yet such conduct would not have commended him to the favorable consideration of his employer. The instinct of a faithful employee impelled him to rescue the cake of ice from its position and restore it to the running-board where it could be easily transported to its destination. While we do not know just how the accident occurred, the evidence in the case, in my judgment, justifies the inference that it resulted from a commendable effort on the part of the deceased to drag the cake of ice to the running-board of the car. If, in any view of the evidence, such an inference is permissible, the question was for the jury. *Porter v. Industrial Comm.* 173 Wis. 267, 181 N. W. 317.

While I concede that there must be a causal relation between the defective slide and the accident, it seems to me that relation is plain enough if the accident resulted from an effort to rescue the cake of ice from its malposition on the top of the car. I cannot see that the fact that it came to a state of rest in any way interrupts that relation. The effort to place the cake of ice on the running-board was made necessary by the fact that it was on the inclined portion of the roof of the car, a position which it had assumed by reason of the defective slide, if the slide was defective.

For these reasons, briefly stated, I think the order of the circuit court granting a new trial should be affirmed.

STATE EX REL. POTRYKUS, Plaintiff, vs. SCHINZ, Circuit Judge, Defendant.

March 14—April 11, 1922.

New trial: Motion not decided within sixty days: Oral continuance of hearing by court: Request of party: Cases where special verdict is rendered: New trial on newly-discovered evidence.

1. A demurrer to the return to an alternative writ of *mandamus* makes the allegations therein contained verities.
2. Under sec. 2878, Stats., requiring a motion for a new trial on the minutes of the court to be made and heard within sixty days unless the court extends the time, where within the time limit the court adjourned the hearing of the motion to a date beyond, the court had jurisdiction to act on the motion at the latter date, especially where the party attacking the granting of the motion was the one who obtained the adjournment.
3. Said sec. 2878 applies to a case in which a special verdict is rendered.
4. An oral order actually made, adjourning the hearing on a motion for a new trial, became the order of the court as effectively as though entered in writing.
5. Where the argument and discussion on a motion for a new trial was wholly on the ground of newly-discovered evidence, and it was because thereof that the court granted a new trial in its discretion, the trial court had jurisdiction, under sec. 2879, Stats., to grant the motion at any time within one year.

MANDAMUS. An alternative writ of *mandamus* was issued out of this court directing the Hon. WALTER SCHINZ, judge of the Second judicial circuit, to vacate his order granting a new trial in the case of *Potrykus v. Davis,* in which a special verdict favorable to the plaintiff had been rendered on the ground that more than sixty days from the rendition of the verdict had elapsed, and therefore by force of sec. 2878, Stats., the motion for the new trial would be constructively overruled, or to show cause to the contrary. The judge made a return to the writ, to which the plaintiff demurred.

For the plaintiff there was a brief by *Cannon, Bancroft*

& Waldron of Milwaukee, and oral argument by *L. H. Bancroft.*

H. J. Killilea of Milwaukee, for the defendant.

VINJE, C. J. The demurrer to the return made the allegations therein contained verities. Such being the case, the plaintiff is met with this situation: If the motion be deemed to have been made under sec. 2878, Stats. 1921, then the return shows that on the 16th day of January, 1922, which was within sixty days of the rendition of the verdict, and when the court was ready to announce its decision, "a representative of plaintiff's attorneys informed the court that Judge BANCROFT, who had charge of the motion on behalf of the plaintiff and who participated in the trial as one of plaintiff's attorneys, because of an engagement elsewhere in court could not be present, and asked that the matter be further adjourned; that in pursuance to such request of plaintiff's attorney the matter was adjourned to January 18, 1922." At the latter date the decision of the court granting a new trial was made. From this return it clearly appears that the court had jurisdiction to act on the 18th of January because of the adjournment at plaintiff's request. The statute specifically provides for adjournment or extension of time within which to act. It has also been held that the parties can waive the provisions of the statute and so confer jurisdiction upon the court to act after the sixty days have expired. *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664; *Kurath v. Gove A. Co.* 144 Wis. 480, 129 N. W. 619; *State ex rel. Kurath v. Ludwig,* 146 Wis. 385, 132 N. W. 130. Likewise this court has held that a party at whose request an adjournment is taken cannot be heard to question the regularity of such adjournment. *Second Nat. Bank v. Smith,* 118 Wis. 18, 94 N. W. 664; *Bailey v. McCormick,* 132 Wis. 498, 112 N. W. 457.

If it be contended that no valid extension or adjournment was made because no written order was entered upon

the minutes of the court, the answer is that the return shows the court ordered an adjournment and such oral order actually made became the order of the court as effectively as though entered in writing. *Wallis v. First Nat. Bank,* 155 Wis. 533, 145 N. W. 195; *Wehr v. Gimbel Bros.* 161 Wis. 485, 154 N. W. 972; *Will of Burghardt,* 165 Wis. 312, 162 N. W. 317.

A question is raised as to whether sec. 2878 is applicable to cases in which a special verdict is rendered. It was held to be applicable to such a case in *Kurath v. Gove A. Co.* 144 Wis. 480, 129 N. W. 619, and in *Notbohm v. Pallange,* 168 Wis. 225, 169 N. W. 557. We see no reason for disturbing such rulings. The purpose of the amendment to sec. 2878 requiring a decision within sixty days of the rendition of the judgment is discussed in *Kurath v. Gove A. Co.* 144 Wis. 480, 483, 129 N. W. 619; and it applies as well to cases where a special verdict is rendered as to those in which a general verdict is taken. The law does not favor unreasonable delays in either case.

But it is quite evident from the affidavits upon which the motion was made that it was a motion for a new trial based upon newly-discovered evidence under sec. 2879, which motion could be made at any time within a year. Were there any uncertainty arising from the contents of the affidavits, such uncertainty is effectively set at rest by the return, which states "that the argument and discussion of the motion for a new trial was wholly on the ground of newly-discovered evidence, and it was because of the newly-discovered evidence, as indicated by all of the affidavits filed on said motion, that led this court, in the exercise of its discretion, to believe that a new trial should be granted." This is conclusive of the whole matter and establishes the trial court's jurisdiction to act under sec. 2879 in granting a new trial on the ground of newly-discovered evidence.

By the Court.—Writ quashed.

HOLSAPPLE, Appellant, vs. SCOFIELD, Respondent.

March 15—April 11, 1922.

Physicians and surgeons: Compensation of dentist: Services rendered in workmanlike manner: Expert testimony.

1. A dentist who performs services for a patient in a good, workmanlike manner and in accordance with the recognized and established practice of those of the same profession in his locality, is entitled to the reasonable value of such services.
2. The issue in such a case is one upon which expert rather than lay evidence is necessary.
3. In an action for services in extracting teeth and making an artificial set, where the uncontradicted evidence of expert witnesses was to the effect that satisfactory results could not be expected during the short time defendant attempted to use the teeth, and defendant herself testified that she refused to try them further, a verdict for the defendant should have been set aside and plaintiff's motion for judgment granted.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This action was originally brought in justice's court to recover for services rendered and materials furnished by plaintiff as dentist for and to defendant. The amount of the bill was $83, upon which defendant had paid $16, such sum being the total of certain items of plaintiff's bill which were designated as materials.

The only answer in the record appears to have been an oral one interposed in justice's court, consisting of a general denial and a counterclaim for the return of the $16 paid.

From a judgment for plaintiff in justice's court defendant appealed to the circuit court, where a trial was had before a jury. The special verdict was as follows:

"(1) Did the plaintiff, in performing the services for the defendant in connection with furnishing her a set of artificial teeth, exercise such care, judgment, and skill as dentists in this community in good standing in their profession usually exercise in performing similar services? *A.* No.

"(2) What were the services rendered by the plaintiff for the defendant in connection with pulling her teeth and making and furnishing her a set of artificial teeth, as shown by the testimony, reasonably worth over and above the sum of sixteen dollars which he has already received? *A.* No more."

After verdict motions were made by the respective parties and thereafter judgment granted on the verdict in favor of the defendant dismissing the action upon the merits, and from such judgment plaintiff has appealed.

The cause was submitted for the appellant on the brief of *Fisher & Geffs* of Janesville, and for the respondent on that of *Edward H. Ryan* of Janesville.

ESCHWEILER, J. The defendant, a lady of over seventy, advised with plaintiff with reference to extracting her six remaining teeth in the lower jaw and making a set of artificial teeth for the lower and the upper jaws. She had for some time prior thereto been using an artificial upper plate.

The plaintiff extracted defendant's six teeth and very shortly after proceeded to take the necessary impressions of the upper and lower jaws for the manufacture of the two plates, which were made and tried in defendant's mouth. Several readjustments were made, none of which succeeded in making the sets of teeth satisfactory to the defendant, and after she had worn or tried them in all about four days she sent them back to plaintiff and refused to pay the balance of the bill.

Plaintiff, in addition to his own testimony, called three dentists as experts, and the substance of their testimony was that after extraction of so many teeth there would be a shrinkage of the substance that surrounded the roots of the teeth and that such process takes considerable time and is slower in those of advanced years. That until there is such final settlement there can be no immediate complete or perfect adjustment of an artificial set of teeth and that changes

are required from time to time until there is a final settlement of the process, and often new plates are then required. That it requires considerable time for a person to adjust himself to such a lower plate. The teeth made by the plaintiff were in evidence in the court below although not returned with the record here. The dentists testified that the materials and workmanship were good, and the articulation, that is the manner in which the teeth came together in the mouth, was properly arranged, and that the price charged by plaintiff was reasonable. They also testified that, although in this particular set the upper teeth projected over the lower set, such was normal, usual, and proper.

The defendant called no one who had any special or expert knowledge as to the nature of such work. The evidence offered on defendant's behalf was to the effect that the teeth did not fit properly in the mouth and that the upper jaw projected too far beyond the lower, and she herself testified that at the times she was trying to use the set the lower plate caused her great inconvenience, pain, and soreness.

If the plaintiff performed the dental service for the defendant and did the same in good, workmanlike manner in accordance with the recognized and established practice of those in the same profession in his locality, he became entitled to the reasonable value of his services.

We must hold in this case that the issue here presented was one upon which expert rather than lay evidence was necessary. *Krueger v. Chase,* 172 Wis. 163, 168, 177 N. W. 510. The testimony of those familiar with that kind of work and services was all one way and to the effect that it was in accordance with the recognized standard of skill in that locality.

It is uncontradicted that a satisfactory result could not in the nature of things be expected during the short time in which defendant attempted to try the teeth furnished by plaintiff, and she herself testifies that she refused to continue any further. The motion, therefore, by plaintiff

to set aside the answers of the jury to the two questions of the special verdict as being unsupported by the evidence should have been granted for the reason that in such class of cases neither court nor jury can use their own individual views nor those of persons unfamiliar with such particular subjects as proper basis for their findings as against the uncontradicted and unimpeached testimony of those who are qualified to know and speak on such subject. Such have been the rulings in surgical cases, such as *Wurdemann v. Barnes,* 92 Wis. 206, 207, 66 N. W. 111; *Ladd v. Witte,* 116 Wis. 35, 40, 92 N. W. 365; and as to architects' services, in *Tullgren v. Karger,* 173 Wis. 288, 294, 181 N. W. 232.

It follows that the court should have set aside the verdict and have granted plaintiff's motion for the amount asked in the complaint.

By the Court.—Judgment reversed, and cause remanded with directions to render judgment for plaintiff.

MCFARLANE, Appellant, vs. DIXON and another, Respondents.

March 15—April 11, 1922.

Vendor and purchaser: Failure of vendor's title: Specific performance: Damages: Failure of title as to part of lands: Remedies.

1. Where vendors who had agreed to convey two lots could not, for failure of title, convey one of them, the purchaser was entitled to rescind the contract.
2. One who makes a valid contract to sell land is bound to know whether he has title, and is answerable in damages if he is unable to fulfil the contract, his liability not necessarily depending on fraud or bad faith.
3. In an action for specific performance, entire failure of title is not in all cases a complete defense to the action, but the court may retain jurisdiction and give damages as compensation.

4. Where there is a failure of title as to a portion of the land, the court may require the vendor to give the best title he can and order an amount abated from the purchase price for the deficiency of title or quantity or quality of the estate.
5. If a vendor agrees to convey land he knows he does not own, or if after making the contract he sells to another or otherwise disqualifies himself to make good his original agreement, he is liable for full compensatory damages, including those for the loss of the bargain.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Defendants agreed to sell to plaintiff two lots in the city of Janesville for $2,000. In the written contract, dated May, 1919, the lots were referred to as "lots 8 and 9, . . . the said premises belonging to W. J. McIntyre, deceased, and the said parties of the first part being residuary legatees and devisees under the will of W. J. McIntyre, deceased, and this agreement to be carried out upon the completion of the probate of the estate of W. J. McIntyre and upon the furnishing of abstracts showing good and marketable title in said first parties, to be conveyed by warranty deed."

It appears that for some years prior to his death W. J. McIntyre had paid taxes on lots 8 and 9, and that after his death both of these lots were included in the inventory of his property. In August, 1920, plaintiff tendered $1,879.50, being the balance due for the two lots. Some months before this time defendants had learned that lot 8 belonged to the estate of Henrietta A. McIntyre and had never been owned by W. J. McIntyre. Plaintiff testified that at the time of the tender in August, 1920, the reasonable value of each lot was $2,200.

The answer admitted the making of the contract, alleged that each thought defendants to be the owner of lot 8 because of a mutual mistake, and prayed that the contract be reformed so as to include only the lot in fact belonging to defendants by virtue of the will of W. J. McIntyre, and as so reformed specifically enforced.

The trial court found as facts that plaintiff received his

information as to the reputed ownership of the lots from his sister and from sources other than the defendants before negotiating for the purchase of the lots; that defendants received their information from the files of the probate court of Maricopa county, Arizona, and other sources; that defendants informed plaintiff that they were the residuary legatees under the will of W. J. McIntyre and that the will was in the course of settlement; that defendants did not claim or assert ownership of the lots other than as such legatees, and that the contract was not to be carried out until defendants furnished an abstract after the settlement of the estate; that defendants did not make any false representations in regard to either lot, and that each believed the lot to be included in the estate of W. J. McIntyre, and that defendants by virtue of being his legatees would have good title.

The court held as matters of law that, since there was no element of tortious conduct on the part of defendants, "the plaintiff may recover such fractional part of the consideration paid as the value, at the time of the purchase, of the piece to which the title fails bears to the value of the whole piece purchased," and that plaintiff should have a conveyance of lot 9 upon payment of $800. Judgment was entered accordingly, an allowance being made for certain outstanding bonds for street improvements, and costs being granted to neither party.

For the appellant there were briefs by *Fisher & Geffs* of Janesville, and oral argument by *A. M. Fisher*.

For the respondents there was a brief by *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville, and oral argument by *O. A. Oestreich*.

JONES, J. There are certain important facts in this case as to which there is no dispute. The defendants believed that they had the right to make the contract as the residuary legatees under the will and that they could convey good title.

The facts that both lots had been included in the inventory of the deceased and that for some years he had been paying the taxes on the lots, with such other facts as came to their knowledge, were circumstances well adapted to raise the belief that they were within their rights in making the contract.

When plaintiff brought the action for specific performance he knew that defendants could not give title to lot 8. In the prayer for relief in the complaint plaintiff demanded that a just deduction "from the purchase money of said two lots be made on account of defendants' failure of title and inability to convey to plaintiff said lot number 8 and on account of interest on plaintiff's purchase money which has been idle and on account of street-improvement bonds and liens against said lot number 9, and on account of damages sustained by plaintiff on account of defendants' failure, refusal, and inability to convey to him said lot number 8, and upon payment by plaintiff of the residue of said purchase money, if any, that said defendants specifically perform said contract as to lot number 9 by a conveyance of said lot to plaintiff and that they furnish to plaintiff an abstract of title showing a marketable title in said defendants of said lot to be conveyed to plaintiff." This plainly shows that the gist of the action was specific performance of the contract.

One of the court's findings was:

"That the plaintiff declared upon the trial that he did not desire to rescind the contract but to have it enforced by a conveyance to him of said lot 9, he receiving such credit on the balance of the purchase price as he might be lawfully entitled to by reason of the defendants' inability to convey to him lot 8."

It is true that plaintiff prayed for damages for the failure to perform the contract as to lot 8, and his counsel claim that for such nonperformance he is entitled as damages to the difference in value of the lot on the date of the contract

and the date when he tendered the balance of the purchase money. Whether plaintiff is entitled to such relief is the only issue in the case.

Since defendants were unable to comply with a substantial part of the contract, plaintiff would have doubtless been entitled to a rescission if he had so elected, but he chose an entirely different and inconsistent remedy. It has been often decided by this court that when a vendor makes a valid contract to sell land he is bound to know whether he has title, and is answerable in damages if he is unable to fulfil the contract. In such cases his liability does not necessarily depend on fraud or bad faith. See cases cited in *Lee v. Bielefeld, ante,* p. 225, 186 N. W. 587. It is also a familiar rule that, where there is an entire failure of title, this is not in all cases a complete defense to the action for specific performance, but the court may retain jurisdiction and give damages as compensation. Pomeroy, Spec. Perf. (2d ed.) sec. 476.

Much greater difficulty arises in cases like the present where there has been a failure of the title as to only a portion of the land conveyed and where specific performance is sought. In an early case in this court it was held that where a purchaser seeks specific performance of a contract and the vendor has not the same interest in the land as that contracted for, or there is a deficiency in quantity, the vendee may enforce a performance of the contract by compelling the vendor to give the best title he can and have a just amount abated from the purchase money for the deficiency of title or quantity or quality of the estate. *Wright v. Young,* 6 Wis. 127. In another action for specific performance where the property sold was represented to contain forty-nine acres but in fact contained about thirty-two and one-half acres, the court followed the rule laid down in the foregoing case and said:

"Where the title fails to only a part of the land conveyed, the grantee may recover, in an action on the covenants of

seizin and right to convey, or upon an agreement to convey, such fractional part of the whole consideration paid as the value at the time of the purchase of the piece to which the title fails bears to the whole purchase price, and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding six years." *Docter v. Hellberg,* 65 Wis. 415, 424, 27 N. W. 176; *Messer v. Oestreich,* 52 Wis. 684, 696, 10 N. W. 6; *Gates v. Parmly,* 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Darlington v. J. L. Gates L. Co.* 151 Wis. 461, 138 N. W. 72, 139 N. W. 447.

The cases we have cited are in line with a leading case decided in England in 1775, *Flureau v. Thornhill,* 2 Wm. Blackstone, 1078, which has been much discussed by the courts and text-writers. Counsel for appellant do not contend that the rule adopted in that case and by this court should be changed, but that it should not be applied in the present case because, it is argued, defendants should have known the state of the title of the land they bargained to sell. This was equally true in the cases we have cited.

There are undoubtedly limitations upon the rule declared in the English case above cited and in the Wisconsin cases. For example, if the seller agrees to convey land he knows he does not own, or if, after making the contract, he sells to another, or otherwise disqualifies himself to make good his original agreement, he is liable to full compensatory damages, including those for the loss of the bargain. *Arentsen v. Moreland,* 122 Wis. 167, 99 N. W. 790.

The trial court followed the rule which has long prevailed in this court, and we consider that the facts fully justified the conclusion reached.

By the Court.—Judgment affirmed.

TOWN OF MILTON, Respondent, vs. MCGOWAN WATER, LIGHT & POWER COMPANY, Appellant.

March 15—April 11, 1922.

Public utilities: Discontinuance of proceedings to acquire utility: Statutory limitation on right to discontinue.

1. Under sec. 1797*m*—81*a*, Stats. (created by ch. 393, Laws 1917), authorizing any municipality having "heretofore" determined to acquire an existing waterworks plant to discontinue proceedings to that end, and sub. (22), sec. 4971, defining "heretofore" in a statute as meaning any time previous to the day when the statute shall take effect, a municipality is not authorized to discontinue proceedings before the railroad commission for the acquisition of a waterworks system where such proceedings were instituted by it after the act of 1917 took effect.
2. The amendment of sec. 1797*m*—81*a*, Stats., by ch. 658, Laws 1919, by the addition thereto of sub. 3, prohibiting the institution of a second proceeding to acquire a public utility by a municipality within four years after the discontinuance of the last prior proceeding, does not change the effect of the section as originally enacted in 1917, authorizing the discontinuance of such proceedings only if they had been instituted before the taking effect of the act of 1917.
3. Though the proceeding to acquire a waterworks system might, in the absence of any statute showing legislative intent to the contrary, be discontinued at any time before the right of the owners of the utility to compensation has become absolute, sec. 1797*m*—81*a*, Stats., has limited the right to discontinue to such proceedings as were begun prior to the enactment of that statute.

APPEAL from an order of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

The appeal is from an order denying the motion of the defendant to dissolve a preliminary injunction restraining the defendant from prosecuting a certain proceeding pending before the railroad commission of Wisconsin.

The defendant company is a public utility corporation engaged, under an indeterminate permit, in supplying water to said town of *Milton* and to the inhabitants thereof. On January 20, 1920, the plaintiff voted to purchase the water

plant of the defendant, and thereafter the plaintiff filed with the railroad commission a certificate of said election, with the request that the commission take such proceedings as might be necessary under the statutes to determine the valuation of said property and the amount to be paid by the plaintiff as compensation therefor. The railroad commission thereupon proceeded to make a survey of the property and to appraise its value.

Prior to the commencement of this action the town officials by resolution resolved to discontinue the proceedings, and the matter was also submitted to a vote of the electors, which vote resulted favorably to such discontinuance. Due notice of the resolution passed by the town officials and of the vote of the electors was served upon the defendant and the railroad commission, with the request that all further proceedings in the matter of acquiring the defendant utility by the plaintiff be discontinued, but, notwithstanding such notice, the defendant gave notice that it would, at a specified time, proceed in the matter to the end that the railroad commission might finally fix the amount to be paid by the plaintiff for such utility. This action was thereupon begun for the express purpose of enjoining the defendant from taking further proceedings in the matter, and a temporary restraining order to that effect was obtained before a court commissioner, whereupon the defendant moved the court to dissolve such order, and upon a hearing of such motion the court made and entered an order denying the same, whereupon this appeal was taken by the plaintiff.

The cause was submitted for the appellant on the brief of *Gettle & Torge* of Madison, and for the respondent on that of *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville.

DOERFLER, J. The only question involved in this case is whether the plaintiff has the power to discontinue the proceedings before the railroad commission.

Ch. 393 of the Laws of 1917 creates sec. 1797*m*—81*a* of the Statutes, which among other things provides:

"Any municipality having heretofore determined to acquire an existing plant or any part of the equipment of a public utility as provided by sections 1797*m*—1 to 1797*m*—109 of the statutes, may discontinue all proceedings to that end at any time prior to the final determination of compensation by the railroad commission by a resolution to that effect by its common council, commission council, village board or town board, provided that such resolution shall not be of force and effect until thirty days after the passage and publication."

A reading of the section referred to clearly discloses the intention of the legislature to provide for a discontinuance of proceedings for the acquirement of a public utility by a municipality, and that such proceedings for discontinuance are limited to municipalities having prior to the enactment of said section determined to acquire an existing plant, etc.

Sub. (22), sec. 4971, Stats., provides that "Whenever the word 'heretofore' occurs in any statute it shall be construed to mean any time previous to the day when such statute shall take effect." With such legislative definition of the word "heretofore," the meaning of sec. 1797*m*—81*a* becomes clear, and no claim can successfully be maintained that such statute is involved in any ambiguity. The record does not disclose any attempt on the part of the municipality, prior to the time said sec. 1797*m*—81*a* became operative, to acquire this utility, and we must therefore assume that no such prior attempt had been made.

In the year 1919, by ch. 658, the legislature amended sec. 1797*m*—81*a* by adding thereto sub. 3, which reads as follows:

"Upon the discontinuance of proceedings by the municipality no subsequent proceedings shall be instituted until at least four years shall have elapsed from the date of the discontinuance of the last prior proceeding."

The title to said ch. 658 of the Laws of 1919 is as follows: "An act to create subsection 3 of section 1797*m*—81*a*

and to amend section 1797*t*—12 of the statutes, relating to fixing the interval between successive proceedings for municipal acquisition."

While it is true that, in the absence of any statutory provision showing a legislative intent to the contrary, a proceeding like this may be discontinued at any time before the right of the owners of the utility to compensation or damages has become absolute (20 Corp. Jur. 1077), the legislature, by the enactment of sec. 1797*m*—81*a*, Stats., has definitely expressed an intent and has limited the right of the municipality to discontinue proceedings begun to acquire a public utility where the municipality has, prior to the enactment of the statute, determined to acquire the utility; and sub. 3 of the statute must be construed in the light of the provisions of the balance of the statute. It can reasonably be assumed that prior to the enactment of the statute in question there existed municipalities which had made one or more attempts to acquire a public utility and where the proceedings have either been discontinued prior to 1917 or thereafter; so that in the enactment of sub. 3 it becomes clear that it was the legislative intent to prohibit subsequent efforts to acquire a utility until the requisite statutory period shall have elapsed.

There is sound reason both for limiting the power of discontinuance and the institution of new proceedings for the acquirement of a utility. It is a matter of common knowledge that the acquiring of a utility by a municipality is connected with the expenditure of a great amount of labor and money, in procuring the proper survey, the appraisal, the hearings before the commission, and other proceedings incident thereto. Therefore we conclude that under the showing made in the instant case the proceedings cannot be discontinued.

The order of the circuit court must therefore be reversed, with directions to dissolve the preliminary injunction.

By the Court.—It is so ordered.

INDEX.

ABETTORS. See CRIMINAL LAW, 1, 2.
ABROGATION OF CONTRACT. See CONTRACTS, 13.
ABUSE OF DISCRETION. See DISCRETION.
ACCEPTANCE.
  Of goods. See CARRIERS, 3. SALES, 8–10.
  Of offer. See CONTRACTS, 5.
ACCESSORY BEFORE THE FACT. See CRIMINAL LAW, 2.
ACCIDENT. See FEDERAL EMPLOYERS' LIABILITY. WORKMEN'S COMPENSATION.

ACTION.

See CONTRACTS, 1. FEDERAL EMPLOYERS' LIABILITY. JUDGMENT. WASTE.

Joinder of causes of action: Plaintiff in individual and representative capacity.
  Sec. 2602, Stats., providing that all persons having an interest in the subject and in obtaining the relief demanded may be joined as plaintiffs, and sec. 2647, providing that several causes of action may be brought in the same complaint if so united that they affect all parties and do not require different places of trial and are stated separately, do not authorize the uniting of an action by an heir for specific performance and a claim by an administrator for conversion for the recovery of damages. *Weinzirl v. Weinzirl,* 420
Action for money had and received. See INSURANCE, 2.
Action on lost instrument. See LOST INSTRUMENTS.
Accrual of action. See CONTRACTS, 3.
ADMINISTRATORS. See EXECUTORS AND ADMINISTRATORS.
ADMISSIONS. See TRIAL, 3. VENDOR AND PURCHASER, 1.
ADVERSE EXAMINATION. See INSPECTION OF INSTRUMENTS, 4. NEW TRIAL, 5.
AGENCY. See PRINCIPAL AND AGENT.
AIDERS. See CRIMINAL LAW, 1, 2, 5.
AMENDMENT.
  Of pleading. See PLEADING, 3.
  Of statute. See STATUTES, 5.
ANCILLARY ADMINISTRATION. See EXECUTORS, 3, 4.
ANSWER. See PLEADING, 2.

APPEAL AND ERROR.

See CONSTITUTIONAL LAW, 2. DRAINS, 10, 11, 13. EASEMENTS, 5. HIGHWAYS, 2. NEW TRIAL, 3. STREET RAILWAYS, 1.

Right to appeal: Decision of circuit court on review of proceedings of inferior tribunals.

1. In cases where a new right is created by statute and a remedy prescribed, the prescribed remedy is exclusive. The right of appeal, being purely statutory, does not exist where it is not given by statute. *Petition of Long,* 361
2. Sec. 3047, Stats., providing that appeals may be taken from the circuit court to the supreme court, is not applicable where the circuit court is given power to review the proceedings of special inferior tribunals, boards, and commissions which have power to perform certain limited specific administrative or *quasi*-judicial duties, where the law creating the tribunal, board, or commission gives no right of appeal from the determination of the circuit court. *Ibid.*
3. An appeal does not lie to this court from a judgment of the circuit court dismissing a petition for compensation on account of unlawful imprisonment, on appeal from the disallowance of the claim by the board created by sec. 3203*a*, Stats., for the relief of persons who have served terms of imprisonment upon conviction of crime of which they were innocent, notwithstanding sec. 3047 provides for appeals to this court from the circuit court, since the right of appeal from the judgment of the circuit court in such case is not provided for by statute. *Ibid.*

Appealable orders: Setting aside service: Change of venue.

4. An appeal lies from an order setting aside the service of a summons, but not from one refusing to set aside the service, in which case a judgment must first be entered and the order reviewed on appeal from the judgment. *Tetley, Sletten & Dahl v. Rock Falls Mfg. Co.* 400
5. An appeal does not lie from an order granting or denying a change of venue. *Brust v. First Nat. Bank,* 14
6. The fact that an order granting defendant's motion for a change of venue, after appeal from a judgment of the civil court of Milwaukee county to the circuit court, included a direction for a trial *de novo* in the circuit court of the county to which the venue was changed, does not make the order appealable, since ch. 261, Laws 1913, provides for a new trial under such circumstances, and such new trial would have followed as of course even if the order had been silent as to that point. *Ibid.*

Summary exceptions: Review. See CRIMINAL LAW, 13, 14.

Questions reviewed: Objection first raised on appeal: Immaterial rulings. See JUDGES, 3.

7. An objection that the issues submitted in a special verdict were not in proper form could not be raised for the first time on appeal. *Hind v. Thomas,* 379

8. Where defendant's counterclaim was not sustained, his objection to the admission of evidence for the purpose of minimizing damages on the counterclaim will not be considered on appeal. *Ibid.*

Same: Harmless or prejudicial error. See APPEAL, 20. CRIMINAL LAW, 11. DISORDERLY HOUSE, 6, 8. HOMICIDE, 6, 8. JUDGMENT, 5. NEGLIGENCE, 2, 3. STREET RAILWAYS, 1. TRIAL, 2, 5, 6, 11.

Effect of opinion of appellate court: Obiter: Law of the case.

9. The binding force of a decision is co-extensive with the facts upon which it is founded; but when a court of last resort takes up a co-related subject matter stating that it intends to decide it, and does so, such decision is not mere *obiter dictum,* but is at least a judicial *dictum. Chase v. American Cartage Co.* 235

10. Where this court was asked to extend a rule of law laid down in a previous decision of the court, the court's statement that it would not only not extend the rule, but would not thereafter recognize it as a valid or just rule, is not mere *obiter dictum.* *Ibid.*

11. Where there are two grounds upon either of which the judgment of the trial court can be rested and the appellate court sustains both, neither is *obiter,* but each is the judgment of the court and of equal validity with the other. *Ibid.*

12. When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a *dictum,* but is a judicial act of the court which it will thereafter recognize as a binding decision. *Ibid.*

13. The judgment of the trial court, though in accord with the rule of imputed negligence as previously stated by this court, did not establish the law of the case so as to preclude this court on appeal from deciding the case in accordance with a contradictory rule of law adopted subsequent to the rendition of the judgment. *Ibid.*

14. A lawful change in a judicial rule, not amounting to a rule of property or its equivalent, by a court of last resort, becomes effective at once, and thereafter upon subsequent appeals operates alike upon acts coming within it whether occurring before or after its announcement. *Ibid.*

15. In an action for the death of an automobile passenger in which the trial court set aside a verdict for plaintiff and rendered judgment for defendant on the theory that the negligence of the driver should be imputed to the passenger, this court, in reversing the judgment, will not remand the case for a new trial as against the defendant's contention that questions as to the passenger's contributory negligence and as to whether her death was proximately caused by the accident were not as fully tried as they should have been, but will direct the lower court to enter judgment for the amount of the verdict, since such question should have been fully litigated at the time of trial. *Ibid.*

16. On a former appeal in this case it was held that the negligence of the driver of an automobile in which plaintiff was riding as an invited guest defeated his right to a recovery, but since that decision this rule of law has been changed (*Reiter v. Grober,* 173 Wis. 493); the legal principles laid down in the first appeal, whether right or wrong, become, however, the law of the case on all future trials or appeals. *John v. Pierce,* 220

Affirmance and reversal. See AUTOMOBILES, 4. CORPORATIONS, 1. CRIMINAL LAW, 7, 8, 12, 13. DISORDERLY HOUSE, 8. DIVORCE, 4. DRAINS, 2, 9, 10. EASEMENTS, 5. EMINENT DOMAIN. FRAUD, 7. HOMICIDE, 8. JUDGES, 3. JURY. NEW TRIAL, 1, 3, 5. PHYSICIANS AND SURGEONS, 2. STREET RAILWAYS, 1.

17. Where the justices of the supreme court are equally divided in opinion—in this case on the question whether under sec. 2625, Stats., as it existed on June 10, 1921, a motion for a change of venue based upon an affidavit of prejudice of the presiding judge, presented after the term had been commenced but after a recess of one week had been taken, was timely made—the ruling of the trial court cannot be disturbed. *Sieb v. Racine,* 617

18. Where the justices of the supreme court are equally divided in opinion on the question involved on an appeal, the judgment appealed from will be affirmed. *Kroner v. United Commercial Travelers,* 151; *Griffin v. Milwaukee E. R. & L. Co.* 179

Disposition of case. See DISORDERLY HOUSE, 8. JUDGES, 3.

19. Where, after a demurrer to a complaint, overruled in the circuit court, was sustained on appeal, and upon remanding the record the circuit court granted leave to amend within twenty days, and upon failure of plaintiff to plead over entered final judgment dismissing the complaint, the judgment will be affirmed, the proceedings being regular and in accordance with proper practice. *Superior W., L. & P. Co. v. Superior,* 626

20. Under secs. 2829 and 3072*m,* Stats., providing that no judgment shall be reversed for misdirection of the jury unless the court can say from an examination of the whole record that the error has affected appellant's substantial rights, it must appear affirmatively of record, with reasonable clearness, not only that the error was harmful, but that it was harmful in a material degree, since error will not be presumed, nor, where it appears, will it be presumed prejudicial. *Heintz v. Schenck,* 562

ARBITRATION AND AWARD.

Powers of arbitrators: Termination: Revising award.

1. Under either a common-law or a statutory arbitration, when the arbitrators have met, heard the proofs, determined the controversy, reduced their decision to writing, and given notice thereof to the parties their power terminates and their functions cease. *Herman Andrae E. Co. v. Courteen,* 92

2. The determination is binding and conclusive although by mistake one of the claims of one of the parties was omitted, and the arbitrators had no power to revise their decision to include such claim on the ground that they had determined the matter before the time had expired within which proofs might be offered, such time limit merely fixing the period beyond which they might not act but not preventing them from rendering a decision before the expiration of such period. *Ibid.*

ARGUMENT OF COUNSEL. See HOMICIDE, 6. TRIAL, 5.

ASSAULT AND BATTERY.

Surgical operation: Consent of patient.

1. A surgical operation without the consent of the patient, if he is in possession of his faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, is a technical assault. *Throne v. Wandell,* 97
2. In an action against a dentist for technical assault, plaintiff's testimony alone, though opposed to that of three witnesses for defendant, is *held* sufficient to support the finding of the jury that her teeth were extracted without her consent. *Ibid.*

ASSIGNMENTS. See FRAUD, 5. WORKMEN'S COMPENSATION, 1, 2, 4.

ASSUMPTION OF RISK. See FEDERAL EMPLOYERS' LIABILITY, 2, 10–14.

AUTOMOBILES.

See APPEAL, 15, 16. HOMICIDE, 7, 8. PLEADING, 3. STREET RAILWAYS, 4–6. TRIAL, 2, 4, 5.

Injuries to pedestrians.

1. Pedestrians cannot heedlessly cross busy city streets, where automobiles and other traffic pass to and fro, without taking the least precaution to discover and avoid approaching vehicles. *Brickell v. Trecker,* 557
2. A pedestrian struck while crossing a street by defendant's automobile, which she did not see until it was within five feet of her, cannot recover damages, since, if the defendant was negligent in not discovering plaintiff before she did, plaintiff was also guilty in not discovering defendant's automobile before it was so close to her. *Ibid.*
3. In an action by a pedestrian for injuries sustained by being run down by defendant's automobile, which was attempting to pass another automobile at a point where plaintiff was waiting for a street car, an answer in a special verdict that plaintiff was not negligent is *held* to be amply sustained by the evidence. *Nelson v. Pauli,* 1

Laborer working in street: Degree of care required.

4. In an action for injuries received by a laborer working in a street, both the question as to whether the driver of an automobile truck was negligent in failing to give warning of his approach, and the question whether the laborer was negli-

gent in pushing a wheelbarrow along a passageway in the street, are for the jury, and, there being evidence to sustain their verdict, it will not be disturbed. *Isgro v. Plankinton Packing Co.* 507

5. A laborer engaged in pavement construction work was not required to use the same degree of care to avoid injury from automobiles using the street as an ordinary traveler thereon. *Ibid.*

Negligence of driver: Collision with other vehicles.

6. An automobile driver who, becoming enveloped in a cloud of dust raised by a passing car, threw off his power, applied his brakes, and brought his car to a stop in thirty-six feet, was not guilty of negligence because while traveling such distance with his view completely obscured he unconsciously swerved to the left of the center of the road, where he was struck by plaintiff's car. *Johnson v. Prideaux,* 375

7. One is guilty of negligence only when he fails to exercise that care and prudence which is generally observed by the great mass of mankind under similar circumstances; but he is not guilty of negligence in unconsciously failing to obey the law of the road where it is impossible to do so by reason of circumstances over which he has no control and for which he is not responsible. *Ibid.*

Same: Sudden peril: Choice of possible actions.

8. The driver of an automobile who by the negligence of another is suddenly placed in an emergency is not guilty of negligence if he makes such a choice of possible actions as a person of ordinary prudence placed in such a position might make, even though he did not make the wisest choice. *Johnson v. Prideaux,* 375

Same: Law of the road.

9. Where a jitney bus driver proceeded to cross a street intersection in front of an automobile approaching from the left and over which he had the right of way, and, on discovering that such automobile had turned and was dangerously approaching, turned in the same direction as such automobile and could have avoided a collision if the automobile had not swerved and struck the rear wheel of the jitney, its driver did not fail to exercise the high degree of care which he owed his passenger and was free from negligence as a matter of law. *McCaffery v. Automobile L. Co.* 230

10. Under sec. 1636—49, Stats., giving to the driver of any vehicle the right of way at street intersections over vehicles approaching from the left, a car approaching from the south and reaching the south line of a boulevard, having driveways on both sides of a center park, before a car approaching from the east on the north driveway of such boulevard reached the east line of the intersecting avenue, did not have the right of way over such car, the intersection protected by the statute being that of the northerly part of the boulevard with the intersecting avenue. *Heintz v. Schenck,* 562

11. The driver of an automobile had a right to assume that the driver of another car along an intersecting street over which he had a right of way would comply with the rules of the road as provided by the statutes and yield to him the right of way. *McCaffery v. Automobile L. Co.* 230

12. It was the duty of a driver of an automobile, upon entering street-car tracks and driving lengthwise thereon, to make observation at the time of entry and from time to time thereafter in order to discover an approaching car so as to enable him in time to give way to such car. *Kornwolf v. Milwaukee E. R. & L. Co.* 160

Violation of statute: Criminal responsibility. See HOMICIDE, 7, 8.

13. Evidence showing that defendant drove a heavy car along a street having a steep down grade and a slight curve, and which had been recently oiled, at a speed of twenty to twenty-five miles per hour, is *held* to sustain a conviction under sec. 1636—49, Stats., for driving an automobile at a rate of speed greater than was reasonable and proper. *Mulkern v. State,* 490

14. Sec. 1636—49, Stats., making it an offense to drive a motor vehicle "at a rate of speed greater than is reasonable and proper, having regard to the width, traffic and use of the highways and the general and usual rules of the road, or so as to endanger the property, life or limb of any person," is sufficiently definite and certain to be valid, though different juries might differ as to what was a reasonable speed under the same circumstances. *Ibid.*

AWARD. See ARBITRATION AND AWARD.

BAIL. See EXECUTION.

BANKRUPTCY.

See FRAUDULENT CONVEYANCES.

Action by trustee: Proof as to insufficiency of assets.

Under secs. 57 and 65 of the federal Bankruptcy Act (30 U. S. Stats. at Large, 544, ch. 541), as to allowance of claims and dividends thereon, in a suit to regain property transferred by a bankrupt in fraud of creditors the trustee in bankruptcy must allege and prove that claims of creditors have been filed and allowed and that the assets are insufficient to satisfy such claims; but the objection that the trustee did not prove that the assets were insufficient to meet the claims of the creditors, which was not raised at the trial, cannot be raised on appeal. *Fernhaber v. Cream City Cartage Co.* 75

BATTERY. See ASSAULT AND BATTERY.

BEQUESTS. See WILLS.

BEST EVIDENCE. See FRAUDULENT CONVEYANCES, 4.

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 13, 14.

Settlement after year: Excuse for delay.

1. Although the court has power to settle a bill of exceptions after the year within which an appeal may be taken has expired, the power should be exercised with caution and only in cases where the parties have brought themselves clearly within the rule, and should not be so exercised as to extend the time within which the rights of parties may become fixed in cases where the default is due to unexcused delay. *Ward v. Racine College,* 168
2. Upon application to enlarge the time for settling a bill of exceptions, the application should be supported by the affidavit of persons having personal knowledge of the facts. *Ibid.*
3. Mere unexcused lapse of time should not avail a party seeking to extend the time, and trial courts should not deem the application in any way personal because a denial may prevent a review of one of its judgments. Parties should be held to a strict rule, otherwise the constitutional right to obtain justice without delay (sec. 9, art. I, Const.) may be defeated. *Ibid.*

BILL OF LADING. See CARRIERS, 2.

BILLS AND NOTES. See CONTRACTS, 1, 2, 8. FRAUD, 1, 4. JUDGMENT, 8, 9. LOST INSTRUMENTS. SALES, 5, 6.

BOARD OF EDUCATION. See SCHOOLS.

BOUNDARIES.

See VENDOR AND PURCHASER, 2, 3.

Agreement to have survey.

A mere agreement to have a survey of lands made, without a further binding agreement to abide by any resulting change in the established and recognized lines, is insufficient to change the lines; and the fact that the defendant changed one line by reason of a survey so made to include additional land to the north did not change another line to the west. *Pionke v. Washburn,* 417

BROKERS.

When commission is earned: Rescission of sale.

1. A special verdict finding that plaintiffs were not entitled to a commission for selling defendant's land unless the purchaser should make a deferred payment thereon is not sustained by evidence which at most showed that plaintiffs agreed to wait until the date of such payment for their commission. *Brown v. Marty,* 456
2. Even though the brokers' right to a commission depended on the purchaser meeting a deferred payment for the land, they can recover their commission where the evidence showed that at the time the payment was due the purchaser had suf-

ficient money in the bank to meet it, but that the contract of sale had been rescinded by the voluntary agreement between the vendor and purchaser. *Ibid.*

Same: Sale by owner: Exclusive agency.

3. One who has given brokers a non-exclusive right to lease or sell land on commission may himself lease or sell to one who, in good faith and without actual or constructive notice to the contrary, he believes has not been procured by such brokers, without being liable to them for commissions. *Ballard v. Archambault,* 217

4. Where a contemplated lease of land for baseball purposes to persons procured by brokers having a non-exclusive right to procure the lease was not consummated for lack of financial ability of the proposed lessees, and the owner, being assured that the land was not wanted for baseball purposes, in good faith having given an option for a lease to another not known to have any connection with the persons procured by the brokers and who he thought wanted the land for manufacturing purposes, he was not liable for commissions upon the execution of a lease to the assignee of the person holding the option, notwithstanding information from the brokers, after the execution of the option and before the execution of the lease, as to a connection between the assignee and such persons and as to the prospective use of the land for baseball purposes. *Ibid.*

BUILDING CONTRACTS. See CONTRACTS, 12, 13.

BURDEN OF PROOF. See COMPROMISE. ELECTRICITY. LOST INSTRUMENTS. RELEASE, 1.. TRIAL, 7.

CANCELLATION. See INSPECTION OF INSTRUMENTS. SALES, 4.

CARRIERS.

See RAILROADS. STREET RAILWAYS.

Jitney busses: Degree of care required in operation.

1. The operator of a jitney bus having complied with secs. 1797—62 to 1797—68, Stats., was a common carrier and was required to exercise toward passengers the highest degree of care reasonably to be expected from human vigilance and foresight in view of the character of the conveyance and consistent with the practical operation of the business, but he was not charged with the necessity of either possessing superhuman powers of anticipation or of exercising such powers in a threatened emergency. *McCaffery v. Automobile L. Co.* 230

Rates: Joint rates with ocean carrier.

2. Carriers subject to the Interstate Commerce Act cannot make a joint rate with an ocean carrier, and the transportation within the United States must be treated as a separate transportation, subject to the terms of that act, whether a separate bill of lading was issued or not. *Waters v. Pfister & Vogel L. Co.* 16

Same: Liability of consignee upon acceptance of goods.

3. Under the Interstate Commerce Act a consignee's acceptance of goods shipped in interstate commerce rendered it liable for the lawful freight charges of the railroad company where the charges prepaid by the ocean carrier were less than the lawful charges. It is the acceptance of the goods, and not the payment of part of the lawful charges, which makes the consignee a party to the contract. *Chicago & N. W. R. Co. v. J. I. Case Plow Works,* 173 Wis. 237, followed. *Waters v. Pfister & Vogel L. Co.* 16

CERTIORARI. See DRAINS, 12.

CHANGE OF VENUE. See VENUE.

CHATTEL MORTGAGES. See FRAUDULENT CONVEYANCES, 1, 2.

CIRCUIT COURT. See APPEAL, 2, 3, 6, 19. CONSTITUTIONAL LAW, 2. WASTE, 3–5.

CITIES. See MUNICIPAL CORPORATIONS.

CITY ATTORNEY. See MUNICIPAL CORPORATIONS, 5–7.

CIVIL COURT OF MILWAUKEE COUNTY. See APPEAL, 6.

CLAIMS.
Against bankrupt. See BANKRUPTCY. FRAUDULENT CONVEYANCES.
Against estates. See EXECUTORS.
Against municipalities. See CONSTITUTIONAL LAW, 1.

COLLATERAL ATTACK. See DRAINS, 12.

COMMISSIONS. See BROKERS. INSURANCE.

COMMON CARRIERS. See AUTOMOBILES, 9.

COMPLAINT. See CRIMINAL LAW, 3.

COMPROMISE AND SETTLEMENT.

Impeachment for fraud: Degree of proof.

Compromise settlements are greatly favored in the law, and when made, particularly when evidenced by writings signed by the claimant, cannot be impeached on the ground of fraud or mistake unless the evidence clearly, beyond reasonable controversy, establishes such mistake or fraud. *Hanley v. Hines,* 252

CONCURRING NEGLIGENCE. See STREET RAILWAYS, 3.

CONDEMNATION. See EMINENT DOMAIN.

CONFLICT OF LAWS. See WORKMEN'S COMPENSATION, 2–4.

CONSIDERATION. See CONTRACTS, 4–6. SPECIFIC PERFORMANCE, 7, 8.

CONSIGNEE. See CARRIERS, 3.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 8. OFFICERS. SCHOOLS, 4. SHERIFFS, 2.

Right to attack validity of statute.

1. Where a village was divided into business and residential districts by ordinance passed pursuant to sec. 61.35, Stats., and a property owner, under the provisions of the statute, filed a claim for damages because his property was placed in the residential district and he was prevented from using it in carrying on most kinds of business, he may not attack the validity of the statute, although in his claim he stated that he submitted it without prejudice to contest the validity of the ordinance. *Pera v. Shorewood,* 261
2. In an action for damages to plaintiff's property from being placed in the residential district, under sub. (4) of said sec. 61.35 (declaring that the issue on appeal to the circuit court from the decision of the village board shall be the loss or damage sustained by the appellant), the validity of the statute may not be attacked on appeal, as the only question to be litigated under the terms of the statute is the amount of damages sustained by the property owner. *Ibid.*

Delegation of legislative power. See INTOXICATING LIQUORS, 1.

Immunity from self-incrimination. See DISORDERLY HOUSE, 4, 5.

Right to speedy justice. See BILL OF EXCEPTIONS, 3.

Disqualification of judges. See JUDGES, 1.

Special legislation. See MUNICIPAL CORPORATIONS, 9.

Title of legislative enactment. See MUNICIPAL CORPORATIONS, 6.

CONSTRUCTIVE TRUSTS. See TRUSTS, 2, 3.

CONTRACTS.

See BOUNDARIES. BROKERS. JUDGMENT, 2, 3, 5. SCHOOLS. VENDOR AND PURCHASER.

Essentials: Offer: Acceptance: Consideration.

1. A complaint which alleged that defendant, a public lecturer upon applied psychology, offered to the world that if any one who had at any time lost any money in any of his business ventures would disclose this fact he would at once pay the full loss, and that plaintiff had sustained such a loss by accepting a note indorsed by defendant in 1895, that he informed the defendant thereof and demanded payment, which was refused, does not state a cause of action. *Briggs v. Miller,* 321
2. The court had jurisdiction of the subject matter of the action, and as plaintiff relied upon a new contract and not upon the original note or indorsement, the statute of limitations was not a defense. *Ibid.*

3. A demurrer to a complaint on the ground that the action was not commenced within the time limited by sec. 4222, Stats., will be overruled where it does not appear from the complaint when the cause of action accrued. *Ibid.*

4. In an action based on an offer to reimburse any one for a loss sustained through defendant's business ventures, *held,* that the bringing to the attention of defendant the fact of his prior liability did not confer any benefit upon the plaintiff nor amount to a detriment to defendant. *Ibid.*

5. In order that a contract may arise, three things must concur: first, the offer; second, the acceptance; and third, the consideration. Where the offer is directed to a class of persons there may be acceptance by an act, and the performance of the act may identify one of the parties, complete the contract, and amount to a consideration; but the one accepting must perform some act other than the mere acceptance, and either confer a benefit upon the promisor or suffer a detriment. *Ibid.*

Consideration. See CONTRACTS, 4–6. SPECIFIC PERFORMANCE, 7, 8.

Failure of consideration.

6. In an action against a denominational college for services in prosecuting a "quick fund-raising campaign" to provide the college with an endowment fund, the evidence is *held* to show that plaintiff induced the making of the contract by falsely representing that he had a "system" which was his personal property and was unique, and that there was a complete failure of consideration. *Ward v. Racine College,* 168

Validity. See INSURANCE, 1. MUNICIPAL CORPORATIONS, 9, 10, 13.

Interpretation: Implied terms: Definiteness. See DEEDS, 2. EASEMENTS, 2. HIGHWAYS, 2. JUDGMENT, 2. SALES. SPECIFIC PERFORMANCE.

7. If a written contract providing for the payment of interest does not specify the particular rate to be paid, it may be presumed that the parties contemplated the legal rate; and where nothing is specified as to the time of payment, the obligation may be considered presently due. *Bast v. Sproll,* 371

8. A contract wherein the owners of a farm agreed to buy certain city property for a specified amount if they could sell their farm for a certain price, and in the event of the purchase of such city property agreed to pay a portion of the price on a certain date, with no provision in the contract as to the time of payment of the balance, was not enforceable as a promissory note because of the indefiniteness as to time of payment, although the contract contained a clause that, "in case of sale of our farm as stated above, this paper will constitute a note for the above amount, $7,000, until paid, interest at the same rate as paid on the farm." *Ibid.*

Contract to forward money: Explanation of receipt given.

9. Desiring the transmission and delivery of 4,000 rubles to his parents in Russia within a certain date, plaintiff paid the defendant express company $1,000 for that purpose, which issued to him a receipt therefor. In an action to recover back the money, the evidence is *held* to establish an agreement, and default, on the part of the company to make delivery of the rubles within such date, entitling plaintiff to recover. *Slivick v. American Express Co.* . 314

10. A receipt for money issued by an express company being entirely silent as to what is to be done with the money, or the purpose for which the payment is made, does not constitute a written contract so as to render inadmissible parol testimony to show what the real contract was. *Ibid.*

11. The refusal of the trial court to submit to the jury the question of whether the remittance was in fact delivered to and retained by the remittee, even though not delivered within the time stipulated, is *held* not error, where the company did not pretend throughout the trial that it made delivery of the remittance or that it had been received by the remittee, and, in fact, supplied proof that the remittance had not been received. *Ibid.*

Building contracts: Modification.

12. Where a contract to build a one-story garage on a cost-plus basis, not to exceed $32,090, was modified to provide for an additional story, a finding of the trial court that there was no contract to build the additional story for a specific sum, but that it was to be built on the cost-plus basis, is *held* to be supported by the evidence. *Brockman v. Werner,* 517

13. Such modification of the contract to provide an additional story for the building, necessitating some changes in the first story, is *held* not to abrogate the written agreement limiting the cost of the building as originally planned. Changes in the original plan, in so far as they increased the cost of the first story, should be considered extras, and any decreased cost should be a credit to the owner. *Ibid.*

Time as essence of contract. See SPECIFIC PERFORMANCE.

Implied contracts. See WASTE, 4.

Rescission of contracts. See VENDOR AND PURCHASER, 5.

Particular forms of contracts.

Of brokerage. See BROKERS.
Of sale. See SALES.
With municipal corporations. See MUNICIPAL CORPORATIONS, 9, 10, 13, 14.
Relating to land. See VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE. See APPEAL, 15, 16. AUTOMOBILES. NEGLIGENCE. NEW TRIAL, 3. STREET RAILWAYS, 4–6. TRIAL, 9–11.

CONVERSION. See PRINCIPAL AND AGENT, 1. TROVER AND CONVERSION.

CONVEYANCES. See DEEDS. EASEMENTS. HUSBAND AND WIFE.

CORPORATIONS.

See MUNICIPAL CORPORATIONS, 13. PRINCIPAL AND AGENT, 1. VENUE, 2, 3.

Actions against: By director to recover salary: Waiver.

1. In an action by the director of a corporation to recover a fixed salary, his intent to waive the same is, under the evidence, *held* to be a question of fact which was properly submitted to the jury, and the judgment rendered on the verdict of the jury negativing such intent cannot be disturbed. *Nelson v. Caddo-Texas Oil Lands Co.* 327

2. A waiver is the voluntary relinquishment of a known right. Intent to waive is an essential element of waiver; and while such intent may be inferred as a matter of law from the conduct of the parties, it is to be determined as a question of fact where the inference does not conclusively arise as a matter of law. *Ibid.*

Action by corporation against officers: Fraud: Negligence.

3. An action to recover in behalf of a foreign corporation moneys converted by its officers, as well as moneys lost to the corporation by their fraudulent and negligent conduct, may be maintained. *State ex rel. Wis. D. M. Co. v. Circuit Court,* 198

Same: Visitorial power over foreign corporation: Venue. See VENUE, 3.

4. Though the state courts will not assume to exercise visitorial powers over a foreign corporation, and, in the absence of statutes, proceedings to forfeit a corporate franchise must be brought in the country or state in which the corporation was created, creditors and stockholders are not without remedy in the state for the fraudulent conduct of its directors and officers. *State ex rel. Wis. D. M. Co. v. Circuit Court,* 198

5. In an equitable action to recover in behalf of a foreign corporation moneys converted by its officers as well as moneys lost to the corporation by their fraudulent and negligent conduct, it is *held* that neither the cause of action nor any part thereof arose within the county where the action was brought, though numerous acts occurred in such county incidental to and leading up to the cause of action and quite necessary to its maintenance, and the action should be removed to the county where the corporation had its principal place of business. *Ibid.*

Service on foreign corporation: Service on agent. See VENUE, 1, 2.

6. Jurisdiction of a foreign corporation by the service of process on an agent in the state cannot be acquired unless it can be deemed that such agent at the time of such service brought

the corporation into the state and unless the presence of such agent within the state amounts to the presence of the corporation. *Tetley, Sletten & Dahl v. Rock Falls Mfg. Co.* 400

7. The mere presence of an agent in the state while not transacting business for the corporation, as where he conducts business of his own, is not sufficient to give the court jurisdiction by service on such agent. *Ibid.*

8. To acquire jurisdiction by service on an agent, a foreign corporation must be actually doing business within the state. *Ibid.*

9. Jurisdiction of a foreign corporation may be acquired by service on an agent who, although transacting purely interstate commerce in this state for four years, continuously solicited orders for the defendant, accepted plaintiff's check, cashed it, and transmitted the proceeds to defendant. *Ibid.*

Municipal corporations. See MUNICIPAL CORPORATIONS.

COSTS. See NEW TRIAL, 1.

COUNTERCLAIM. See APPEAL, 8. JUDGMENT, 9. SALES, 11.

COUNTY JUDGE. See HIGHWAYS, 2. JUDGES, 1.

COUNTY OFFICERS. See SCHOOLS, 4.

COURTS.

See EXECUTION.

Power of county court: Control over decrees.

1. The duty and power of the county court, so far as it affects the property of a deceased person, is not impaired by mere lapse of time, so long at least as title to real property, under the special statutes regulating that subject, is not questioned or rights of innocent purchasers of real or personal property affected. *Guardianship of Reeve,* 579

2. A decree of the probate court may be subsequently annulled when clearly shown to be without foundation in law or in fact, the jurisdiction to grant such relief being primarily in such probate court rather than in a court of general equity powers. *Ibid.*

Supreme court. See APPEAL.

Circuit courts. See APPEAL, 2, 3, 6, 19. CONSTITUTIONAL LAW, 2. WASTE, 3–5.

County courts. See EXECUTORS. GUARDIAN AND WARD. INSANE PERSONS. WASTE, 3–5. WILLS.

Civil court of Milwaukee county. See APPEAL, 6.

CRIMINAL LAW.

See AUTOMOBILES, 13, 14. INDICTMENT. OFFICERS.

Aiders and abettors in crime.

1. Under secs. 4613 and 4614, Stats., one aiding or abetting another in the commission of a felony is guilty as a principal. *In re Carlson,* 538

2. An accessory before the fact must be prosecuted as such; but one present aiding and abetting in the commission of a felony may be convicted as a principal although only guilty of assisting in committing the offense. *Ibid.*

Trial on invalid information: Certainty in stating offense: Jurisdiction. See INDICTMENT.

3. Jurisdiction to try and punish for crime cannot be acquired otherwise than in the mode prescribed by law; and where the complaint, indictment, or information is invalid, the court is without jurisdiction. *In re Carlson,* 538

4. Under sec. 7, art. I, Const., the accused is entitled to know with what he is charged; and not only must all the facts and circumstances which constitute the offense be stated in the indictment or information, but they must be stated with such certainty and precision that the defendant may be able to judge whether they constitute an indictable offense, in order that he may demur or plead and prepare his defense and be able to plead the conviction or acquittal in bar of another prosecution. *Ibid.*

5. The information in this case, charging the accused with unlawfully and feloniously aiding another in committing the felonious and wilful murder of deceased, being insufficient to charge murder in the first degree, does not include and charge murder in the second and third degrees where it contains no apt language charging such lower degrees. *Ibid.*

Same: Conviction of offense not charged.

6. Where an information charges an offense, the court, having jurisdiction of the defendant and the subject matter, could proceed; but where it failed to charge the commission of murder in the first degree, the judgment of conviction thereof upon the defendant's plea of guilty was clearly erroneous. *In re Carlson,* 538

7. Under such circumstances a judgment of conviction of first-degree murder upon a plea of guilty which was erroneous, but not beyond or without the court's jurisdiction, cannot be reached in a proceeding in *habeas corpus.* *Ibid.*

8. Where the information did not charge murder in the first degree, but defendant was convicted thereof upon a plea of guilty, he was entitled to a review by writ of error under sec. 21, art. I, Const.; and if, by reason of his neglect or want of knowledge as to his rights, the defendant has been unjustly punished, he may appeal to the governor of the state, who could relieve from unjust or excessive punishment, under sec. 6, art. V, Const.; but the merits of the case cannot be reviewed by *habeas corpus.* *Ibid.*

9. The right of the accused to be heard as to whether he has anything to say why sentence should not be pronounced against him is not a mere formality. *Ibid.*

10. In accepting a plea of guilty under sec. 4712, Stats., and awarding a sentence thereon, where the information charges an

offense which includes others the court should adjudge the defendant guilty, stating the offense, though this may not be technically necessary. *Ibid.*

Verdict in absence of accused and counsel.

11. It was not reversible error to permit the jury to return a verdict in the absence of the accused and his counsel, where the court informed the accused and his counsel that if the jury reached a verdict before 9 or 10 o'clock that evening he would be in attendance to receive it, and the sheriff notified counsel for the accused by telephone when the jury was ready to return its verdict. *Clemens v. State,* 289

Question for jury.

12. The evidence in a criminal case being in sharp conflict, it was a question for the jury to determine from all the evidence as to which side was telling the truth, which testimony it considered credible or otherwise and which it would believe, and having found a verdict it cannot be disturbed on appeal. *Clemens v. State,* 289

Summary exceptions before sentence: Questions reviewed.

13. Sec. 4720, Stats., providing that any person convicted of an offense before the circuit court may reduce to writing in a summary mode exceptions to the ruling of the court on matters of law, does not bring up the whole case for review. Exceptions—in this case to an order refusing a nonsuit, to an order denying a new trial, and to a denial of a motion in arrest of judgment,—although proper in form, which raise the question of the sufficiency of the whole evidence to sustain a conviction, cannot be considered; nor will an exception to the charge of the court, which standing alone was correct, be considered if it involves the whole record and a recourse to all the evidence in the case. *Corscot v. State,* 103

14. Under sec. 4720, Stats., as to exceptions before sentence, there must be incorporated in the exceptions so much of the evidence or proceedings upon the trial as is relied upon to support the claim of error. *Ibid.*

Reasonable doubt as to guilt. See INTOXICATING LIQUORS, 3.

Compensation to one wrongfully imprisoned. See APPEAL, 3.

Specific offenses.

Aiding and abetting. See CRIMINAL LAW, 1, 2.
Keeping disorderly house. See DISORDERLY HOUSE.
Manslaughter. See HOMICIDE.
Murder. See CRIMINAL LAW, 5, 8. HOMICIDE.
Violation of automobile statutes. See AUTOMOBILES, 13, 14. HOMICIDE, 7, 8.
Violation of liquor laws. See INDICTMENT, 2, 3. INTOXICATING LIQUORS.

CROSS-EXAMINATION. See FRAUDULENT CONVEYANCES, 4.

CUSTODY OF CHILDREN. See DIVORCE, 1–3.

CUSTOMS. See SALES.

DAMAGES.

See CONSTITUTIONAL LAW, 2. DRAINS, 9, 10, 12. EMINENT DOMAIN. FRAUD, 1, 8. SALES, 3. SPECIFIC PERFORMANCE, 7–9. TRIAL, 6. VENDOR AND PURCHASER, 4, 7.

Liquidated damages.

1. Where damages are stipulated by the parties, the sum named will be treated as liquidated damages unless the amount appears to be grossly in excess of actual damages or to have no relation thereto. *Dekowski v. Stachura,* 154

Excessive or inadequate damages.

2. The amount of damages being peculiarly a jury question, the court will set aside a verdict as excessive with reluctance, especially where it has been approved by the trial court. *Heintz v. Schenck,* 562
3. A verdict of $8,000 to compensate plaintiff, a painting contractor sixty-two years of age, for injuries to his shoulder joint impairing his ability to work, for hospital and physician's bill of $144.20, and for repairs to his automobile amounting to $187.50, is considered excessive by $2,000. *Ibid.*
4. A special verdict of $4,000 financial loss to a widow for the death of her husband, while lower than ordinarily found in such cases, is not so inadequate as to indicate that the jury were prejudiced in favor of defendant. *Sharp v. Milwaukee E. R. & L. Co.* 340
5. A judgment for $3,500 is excessive for the extraction, without plaintiff's consent, of six of her teeth, all but one of which had certainly been crowned and the other probably so, all of the teeth being broken down and the nerves dead so that they could not be filled and would, as time went on, have to be extracted. The damages should be reduced to $2,000, and the case is remanded for a new trial unless plaintiff consents to such reduction. *Throne v. Wandell,* 97

Same: Medical expenses: Instructions.

6. A verdict of $10,000 in favor of a motorman sixty-three years of age and having a life expectancy of twelve years, while high is not excessive, where it appears he sustained a painful injury to his ankle which left a stiffened joint and a shortened limb with no chance of substantial improvement, and that besides incurring a large expense for medical and hospital service plaintiff had up to the trial sustained a loss in wages of $2,000. *Nelson v. Pauli,* 1
7. An instruction, "You will also consider the reasonable value of the medical services which the plaintiff received," was not prejudicial in that the evidence disclosed that plaintiff received gratuitous services from certain doctors connected with a mutual benefit association of which he was a member, where only the value of the services of the doctor he hired to treat him was properly proved on the trial and the jury were instructed that they should name such sum as would compensate the plaintiff, as it could not consistently be

claimed that the jury either considered or made any allowances for services rendered by the physicians rendering the gratuitous services. *Ibid.*

Amount of damages as affected by contributory negligence. See FEDERAL EMPLOYERS' LIABILITY, 15.

Multiple damages. See WASTE, 1.

DEATH. See FEDERAL EMPLOYERS' LIABILITY, 1. PLEADING, 3. RAILROADS, 2. WORKMEN'S COMPENSATION, 3.

DEBTOR AND CREDITOR. See ACTION. ARBITRATION AND AWARD. BANKRUPTCY. BROKERS. CARRIERS, 2, 3. CONTRACTS. CORPORATIONS, 1, 2. DAMAGES. EXECUTORS. FRAUDULENT CONVEYANCES. INSURANCE. JUDGMENT. LOST INSTRUMENTS. MUNICIPAL CORPORATIONS, 8, 11–14. NEW TRIAL, 4. OFFICERS, 1. PHYSICIANS AND SURGEONS, 3–5. PRINCIPAL AND AGENT. SALES. SPECIFIC PERFORMANCE, 9. TROVER. TRUSTS. WASTE, 1, 2, 5.

DECEIT. See FRAUD.

DEEDS.

See EASEMENTS. MUNICIPAL CORPORATIONS, 4.

Deeds redelivered to grantor for safe-keeping: Conditional deeds.

1. Deeds executed by a father to his children six years prior to his death and actually delivered to them, who handed them back to the father for safe-keeping, are valid as against the father's second wife, with whom he did not become acquainted until two years after the execution of such deeds, but who claimed the deeds were fraudulent as to her dower and homestead rights, though the father retained possession of the lands or leased them to his children. *Sederlund v. Sederlund,* 627

2. A deed containing a provision that the conveyance was to take effect in the future upon the happening of a particular event, such as the death of the grantor, is valid; and in this case there was a completed delivery, transferring the title to the children, which could not be divested except by a transfer from them or one resulting by operation of law. *Ibid.*

DEFAULT. See BILL OF EXCEPTIONS. TRIAL, 1.

DEFINITIONS. See WORDS AND PHRASES.

DEMURRER. See CONTRACTS, 3. JUDGMENT, 9. MANDAMUS. PLEADING, 1, 2.

DENTISTS. See ASSAULT. DAMAGES, 5. PHYSICIANS AND SURGEONS, 3–5.

DESERTION. See DIVORCE, 3.

DICTUM. See APPEAL, 9, 12.

DIRECTORS. See CORPORATIONS, 1–5.

DISCOVERY. See INSPECTION OF INSTRUMENTS.

DISCRETION OF COURT. See BILL OF EXCEPTIONS. DISORDERLY HOUSE, 5. DIVORCE, 4. INSPECTION OF INSTRUMENTS, 4, 5. NEW TRIAL, 1–3, 9. PLEADING, 3. TRIAL, 1.

DISMISSAL OF ACTION. See JUDGMENT. NEGLIGENCE, 5.

DISORDERLY HOUSE.

Husband and wife as joint keepers.

1. In a prosecution of husband and wife for keeping a house of ill fame, the evidence is *held* sufficient to authorize the submission to the jury of the issues as to whether the wife was one of the keepers of the house or participated actively in its management and had knowledge of the unlawful use of the premises. *Haffner v. State,* 471
2. The presumption that what a wife does in her husband's presence she does because of his coercion is inapplicable in such a prosecution. *Ibid.*

Trial: Question for jury: Evidence.

3. The question whether defendants received money paid a waiter by visitors for the use of rooms is for the jury. *Ibid.*
4. Statements of the district attorney that there were some things that half the members of the firm might have explained but did not, and that the husband testified as to what he knew but that he could not tell what somebody else knew, were improper, and, if unexcused, were in violation of sec. 4071, Stats., providing that defendant's refusal or omission to testify shall create no presumption against him, though defendant did not call his bartender to testify, as the jury may have believed that the remarks referred in part to the defendant wife. *Ibid.*
5. Where it is fairly inferable from the statements of counsel for the state, to which objection was made as commenting on defendant's failure to testify, that defendants' counsel had discussed the nonproduction of witnesses by the state, it will not be presumed that the trial court, whose discretion in such matters is wide, erred in permitting such statements, though the record did not disclose what statements had been made by defendants' counsel. *Ibid.*
6. Where there was ample proof of immoral practices in defendants' house, proof of the sale of liquor to visitors was admissible and not prejudicial, such sale not being an independent offense disconnected with the offense charged. *Ibid.*

Knowledge of owner as to conduct of visitors.

7. One cannot be convicted of keeping a house of ill fame under sec. 4589, Stats., without knowledge of the unlawful conduct of visitors, but such knowledge may be proved by circumstantial evidence. *Haffner v. State,* 471
8. A conviction of keeping a house of ill fame, where the evidence as to immoral acts by frequenters was clear, and the circumstantial evidence as to the knowledge of the defendants of these acts was such that the jury could hardly have avoided finding such knowledge, will not be reversed because of an erroneous instruction that to convict it was sufficient if the keeper of the house, as a person of ordinary prudence and

caution, ought to have known that the house was being used for unlawful purposes, as this court, after an examination of the entire proceeding under sec. 3072*m*, is convinced that defendants' substantial rights were not prejudiced. *Ibid.*

DISPOSITION OF CASE. See INSURANCE, 2.

DITCHES. See DRAINS.

DIVISION OF ESTATE. See DIVORCE.

DIVORCE.

Division of estate: Custody of children: Appointment of trustee.

1. In a divorce action, an allowance to the wife of the use of the homestead for life, taxes and insurance upon which the husband was required to pay, and an award to her of $5,082.15 out of the balance of the property, amounting to $6,554.37, is excessive, even though the wife has debts in the sum of $2,000, and the property of the parties, which had been largely earned by their joint labors, will after the payment of all debts be equally divided. *Twohig v. Twohig,* 275
2. Where a decree is granted to the husband, but the wife is charged with the maintenance of the children, it is proper to allow the wife more than the usual one third, even though her marital delict is the greater. *Ibid.*
3. It was proper to give the custody of two minor daughters, aged thirteen and eight, to the wife, notwithstanding she was guilty of desertion, where there is no claim that the wife was not morally fit to care for the children. *Ibid.*
4. If the trial court has refused to appoint a trustee for the wife, such action will not be disturbed unless an abuse of discretion appears. *Ibid.*

DOMICILIARY ADMINISTRATION. See EXECUTORS, 3, 5.

DOWER. See DEEDS, 1.

DRAINS.

Organization of drainage district: Petition.

1. Under sec. 1379—11, Stats., lands specifically described in a petition for the organization of a drainage district which was signed by the owner of the lands may be included therein if within the territory constituting the proposed drainage district, though not included in the district as shown by the blue-print map filed with the petition. *In re Catfish River D. Dist.* 607
2. Lands part of which would be benefited by drainage and other parts of which may be made more accessible, and lands adjoining a proposed district which will be benefited and must be included in the district for the purpose of constructing the drainage ditch, though the area of wet lands therein is small, may be included in the petition for the organization of the district, though only a small portion would be directly benefited, as the preliminary survey need not be as accurate and

definite as is contemplated by sec. 1379—18, Stats., when the commissioners make their final report; and the evidence is *held* to justify the order of the court by which the district was organized. *Ibid.*

Same: Supplemental petitions: Who are "owners."

3. Under sub. 6, sec. 1379—11, Stats., supplemental petitions by owners of lands adjoining a proposed drainage district may be filed where the signatures of the owners of one half of the lands in the district have not been obtained to the original petition; but where the lands of the supplemental petitioners do not require drainage, the signatures of the owners thereof being obtained merely to complete the necessary acreage, and the proceedings partaking of the nature of a gerrymander, the petition should be denied. *In re Catfish River D. Dist.* 607

4. An order of the trial court organizing a drainage district and appointing commissioners pursuant to petitions under sub. 1 (a) to (g) and sub. 6, sec. 1379—11, Stats., will be affirmed, though the creation of the district might not have sprung from the common desire of the landowners to promote the public health or to secure generally the incidental benefits to themselves contemplated by the statute, as indicated by the fact that some who joined in the proceeding subsequently regretted their participation but could not withdraw their signatures. *Ibid.*

5. Where a vendee of 220 acres of land, of which 120 acres were included in a proposed district, had paid $8,500 on the purchase price, including $2,500 received from the resale of twenty acres, for which the vendor executed a deed, the trial court properly deducted $2,500 from both the purchase price and total payments and computed the vendee's interest in the remaining 200 acres in the proportion that the adjusted payments and the adjusted purchase price bore to each other, in determining whether the owners of one half of the land included in the district signed the petition; the interests of the vendor and purchaser, both of whom, as holders of the legal and equitable titles respectively, may properly be called "owner" within the drainage statutes, being measured by the parts of the purchase money paid and unpaid. *Ibid.*

6. The trial court also properly computed the interest of the owner of a life estate in land included in the district in accordance with her age and the mortality tables; the rule crediting the vendee under a land contract with an interest in the land measured by the part of the purchase money paid being applicable to the owner of the life estate, between whom and the remaindermen the benefits from the drainage should be apportioned ratably. *Ibid.*

7. The proceedings under the drainage district law are equitable in their nature and must be liberally construed. *Ibid.*

[8. There being sufficient acreage otherwise, it is unnecessary to consider the question whether the lands included in the highways or in the railroad right of way should be credited either in favor of or against the petitioners.] *Ibid.*

Town drainage systems: Award of damages: Appeal.

9. In proceedings to establish town drainage systems, sec. 1362, Stats. 1917, which provides that the town supervisors "shall award just damage to each piece of land damaged by the proposed work," must be substantially followed. Where damages are shown they must be separately assessed, and a failure to do so results in a loss of jurisdiction. *Guenther v. Rutkowski,* 180

10. The supervisors having lost jurisdiction by such failure to assess and award damages, a party's appeal to the county court from the order of the supervisors did not invest them with jurisdiction, and commissioners appointed by the court to hear the appeal acquired none. *Ibid.*

11. Where plaintiff mistook his remedy when he appealed from the order assessing benefits, there being no jurisdictional order to appeal from, the appeal did not operate as a waiver of the right remedy. *Ibid.*

12. An order assessing benefits from the construction of a drain but not assessing damages as required by sec. 1362, Stats. 1917, though damages are shown, may be attacked directly by a suit in equity or collaterally, the remedy by *certiorari* not being adequate. *Ibid.*

13. Plaintiff having seasonably called attention to a jurisdictional defect in the proceedings, and having protested on appeal, taken before the work was begun, he is not guilty of such laches as to defeat his right to equitable relief against the assessment. *Cotzhausen v. Dick,* 138 Wis. 127, distinguished. *Ibid.*

EASEMENTS.

Construction: Wall built by agreement.

1. In a deed conveying a tract of land, a grant of a right of way of "eight feet on the east side" of a tract owned by the grantors is construed to cover the east eight feet of the tract, the east line of this land being coterminous with the east line of the right of way. *F. W. Woolworth Co. v. Vogelsang,* 366

2. If the deed were indefinite, the end of a party-wall constructed by mutual agreement would determine the location of the right of way. *Ibid.*

Use by owner of servient estate.

3. The owner of the servient estate is entitled to make such use of the strip affected by the right of way as he may without unreasonably interfering with the use of the right of way by the dominant owner. *F. W. Woolworth Co. v. Vogelsang,* 366

4. The owner of an estate subject to a right of way for a driveway cannot erect posts to support a roof over the driveway which encroach thereon so as to leave a space only seven feet six inches wide, or only ten inches wider than the trucks used

by the owner of the driveway, since such narrowing of the driveway is a substantial impairment of the right of way. *Ibid.*

5. On appeal from a judgment enjoining an unlawful use of a right of way the court will not, although urged by the parties, lay down general rules in regard to the future use and enjoyment of the premises. *Ibid.*

ELECTIONS. See MUNICIPAL CORPORATIONS, 5, 7.

ELECTRICITY.

Negligence of power company: Death of customer: Res ipsa loquitur.

In an action against a power company for the death of plaintiff's wife, caused by electrocution from the socket of an electric lamp in the basement of plaintiff's residence supplied with electricity upon a secondary wire ordinarily carrying 110 volts, plaintiff's evidence that the deceased stood in a place where contact with a voltage of 110 would not ordinarily result in death or serious injury and that there was an opportunity for the 2,300 voltage of the primary service wires of the company to reach the secondary wires because of the company's negligence in not making reasonable repairs, is *held* to establish *prima facie* defendant's liability under the doctrine of *res ipsa loquitur,* and the burden then rests on the power company to prove that the current did not reach her through the high voltage. *Stark v. Badger Public Service Co.* 600

EMBARGO. See SALES, 4.

EMINENT DOMAIN.

Erection of dam: Damages to landowners.

In proceedings by landowners to appraise the damages accruing from the construction of a dam which it is claimed caused a raising of the ground level of the water on their land, where there was evidence that the condition of the petitioners' lands might have resulted from excessive rainfall as well as from the construction of the dam, an order appointing commissioners to appraise the damages will be reversed, with instructions to dismiss the petition without prejudice to petitioners' right to institute new proceedings if within the period of the statute of limitations the lands remained in a wet condition during a continued period of normal rainfall. *Application of Gehrke,* 452

EMPLOYERS' LIABILITY. See FEDERAL EMPLOYERS' LIABILITY. WORKMEN'S COMPENSATION.

EQUITABLE CONVERSION. See WILLS, 5, 6.

EQUITY.

See CORPORATIONS, 4, 5. COURTS, 2. DIVORCE. DRAINS, 7, 12, 13. HUSBAND AND WIFE, 2–4. JUDGMENT, 8, 9. MUNICIPAL CORPORATIONS, 11–14. SPECIFIC PERFORMANCE. TRUSTS. VENDOR AND PURCHASER, 5. WILLS, 5–8.

Failure to assert legal rights.

Equity will not afford relief to a party that was passive and indifferent at a time when he might have secured his rights in a court of law. *First Nat. Exch. Bank v. Harvey,* 64

ERROR. See APPEAL AND ERROR.

ESPIONAGE ACT. See JUDGES, 1.

ESTATES OF DECEASED PERSONS. See WILLS.

ESTOPPEL. See FEDERAL EMPLOYERS' LIABILITY, 2. SPECIFIC PERFORMANCE, 6.

EVIDENCE.

Judicial notice. See INDICTMENT, 3.

Presumptions. See APPEAL, 20. DISORDERLY HOUSE, 2, 4, 5. NEW TRIAL, 1. RELEASE, 2. SALES, 11.

Admissions. See TRIAL, 3. VENDOR AND PURCHASER, 1.

Best or secondary evidence. See FRAUDULENT CONVEYANCES, 4.

Opinion evidence: When to be used: Effect. See PHYSICIANS AND SURGEONS, 4, 5. SALES, 12, 18.

1. Opinion evidence should not extend to the merits of the controversy where it is not clearly within the realm of scientific knowledge. *Tegen v. Chapin,* 410
2. Opinion evidence alone is not conclusive in any case, but the jury must pass on the probabilities; and unless the opinion relied on is within the scope of reason and common sense it should not be regarded. *Ibid.*

Weight and sufficiency. See ASSAULT, 2. AUTOMOBILES, 3, 4, 9, 13. BROKERS, 1, 2. COMPROMISE. CONTRACTS, 6, 9, 12, 13. DISORDERLY HOUSE, 1, 8. EXECUTORS, 6. FEDERAL EMPLOYERS' LIABILITY, 5, 9. FRAUD, 4. HOMICIDE, 4, 5. INSURANCE, 2. JUDGMENT, 8, 9. NEW TRIAL, 3, 4. PHYSICIANS AND SURGEONS, 5. RAILROADS, 2. RELEASE, 2. SALES, 18. VENDOR AND PURCHASER, 1.

Relevancy, materiality, and competency. See CONTRACTS, 10, 11. DISORDERLY HOUSE, 7. FRAUDULENT CONVEYANCES, 4. INSPECTION OF INSTRUMENTS, 5. PHYSICIANS AND SURGEONS, 2, 4. RELEASE, 1. SALES, 6, 12, 16. TRIAL, 3, 4.

Cumulative evidence. See NEW TRIAL, 4.

Newly-discovered evidence. See NEW TRIAL, 9.

EXCEPTIONS. See BILL OF EXCEPTIONS. HOMICIDE, 8.

EXCESSIVE DAMAGES. See DAMAGES, 2, 3, 5, 6.

EXECUTION.

Prisoner on tort judgment: Board: Jail limits.

1. The provision of sec. 4320, Stats., that a creditor must advance payment for the board of a prisoner held on body execution during the time for which he may be imprisoned, and that the failure to make such advance payment shall discharge the prisoner, was intended to protect the public against the expense of boarding him, and does not apply where the public is otherwise protected, as where the prisoner is allowed jail limits on bond. *Schuier v. Kuswa,* 48
2. A prisoner on a tort judgment who gives bail and is out on jail limits relieves the judgment creditor from the prepayment of board from the time the prisoner leaves the jail. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

See ACTION. COURTS. WASTE. WORKMEN'S COMPENSATION.

Administration of estate in two or more jurisdictions: Insolvency.

1. Where the entire assets of a deceased, though found in several jurisdictions, are insufficient to pay all obligations, there is such an interdependence between the various jurisdictions that the assets in their respective control will be considered as one fund, to be distributed *pro rata* to all creditors in the several jurisdictions by the several courts therein administering the affairs of the deceased, when the fact of insolvency is brought to the attention of the courts. *Estate of Hanreddy,* 570
2. The manner in which the insolvency is brought to the attention of the court is immaterial. *Ibid.*
3. The court having jurisdiction of ancillary administration, in so treating all the assets as one fund to be prorated to creditors in both jurisdictions may properly retain control of sufficient assets so that, when the proper percentage is ultimately determined in the several jurisdictions, the creditors whose claims are filed and allowed in the jurisdiction of the domiciliary administration shall be paid their proper percentage. *Ibid.*
4. Where the county court has ancillary jurisdiction in the administration of the estate of a decedent, it may properly pass upon and adjust the claims of nonresident creditors. *Ibid.*

[5. The question whether a judgment obtained against the executrix in the state where domiciliary administration was pending could be considered a judgment such as might be certified to the county court under sec. 3846, Stats., or whether it was barred for failure to file the claim under sec. 3844, not determined.] *Ibid.*

Claim against estate: Evidence: Sufficiency.

6. Evidence taken upon a claim filed against an estate in the county court showing that the deceased and his brother turned over their property to claimant, who was a nephew of de-

ceased, for investment and management under an agreement that claimant would receive no compensation except such remuneration as he might receive from borrowers, and that claimant was guilty of malfeasance in the handling of the estate, is *held* to sustain the finding of the court that claimant had no expectation of receiving compensation from deceased, but conceived the idea of making a claim therefor when his authority over the estate was revoked. *Estate of Austin,* 265

7. In this case, where claimant dealt with trust funds as his own and in numerous cases used them to his own advantage, he could not claim compensation for his services. *Ibid.*

EXPERT TESTIMONY. See EVIDENCE, 1.

EXTRAS. See CONTRACTS, 13.

FACTORS. See BROKERS.

FAILURE OF CONSIDERATION. See CONTRACTS, 6.

FALSE REPRESENTATIONS. See CONTRACTS, 6. FRAUD. VENDOR AND PURCHASER.

FEDERAL EMPLOYERS' LIABILITY.

Conditions affecting liability: Interstate commerce.

1. A railroad employee sent from one city to another to make repairs on cars being used in interstate commerce was engaged in "interstate commerce" when, having finished the repairs and on his return to report to the foreman, he was killed by a passenger train on another track while attempting to board a moving freight train. *Richter v. Chicago, M. & St. P. R. Co.* 188

Same: Bringing action within two years.

2. The right to maintain an action under the federal Employers' Liability Act for personal injuries is conditional on bringing the suit within two years, as required by sec. 6 of the act, which is not merely a limitation of the remedy; and verbal promises and acts by the employer that might ordinarily constitute an estoppel do not estop the employer from pleading the limitation. *Gauthier v. Atchison, T. & S. F. R. Co.* 245

3. Allegations in a complaint that the defendant employer represented to plaintiff that it would settle for his injuries and that it would be unnecessary for him to sue, and that he relied thereon and neglected to sue in time and thereby lost his cause of action, are construed to relate to future events and not to existing facts, and are therefore insufficient to show actionable fraud. *Ibid.*

Same: Proximate cause of injury.

4. The federal Employers' Liability Act does not give a new cause of action which did not exist at common law, but modified the common-law rule with respect to the defenses of contributory negligence, assumption of risk, and negligence of a fellow-servant; and under the federal Safety Appliance Act

an injured employee, to recover, must show that the improper equipment was the proximate cause of his injury. *Westgard v. Chicago, M. & St. P. R. Co.* 636

5. A cake of ice had slipped from a slide leading from an ice-house to a refrigerator car which was being loaded, and came to rest on the top of the car instead of on the running board, whereupon an employee proceeded to drag it to the ice bunker, and after he had moved it six or eight feet, in some unexplained way he lost his hold, fell off the car, and was killed. *Held,* even if the slide were insufficient, there was no causal connection between such insufficiency and the injuries of the deceased. *Ibid.*

6. In actions under the federal Employers' Liability Act the plaintiff must prove not only that the defendant railroad was negligent, but also that such negligence was the proximate cause of death. *Richter v. Chicago, M. & St. P. R. Co.* 188

7. The rule that one whose wrongful act causes the doing of another act which results in injury is responsible for the consequences which flow from the latter act is based upon the fact that the wrongdoer, using reasonable diligence, should have foreseen the result; but it is not necessary that the injury in the precise form in which it in fact resulted should have been foreseen. *Ibid.*

8. In the absence of proof that a railroad employee had previously been permitted to ride upon a freight engine contrary to a positive rule of the railroad company, the jury was not justified in deciding that it was the duty of the engineer to stop the engine for the purpose of permitting him to get aboard and to ride to another city where it was his duty to go. *Ibid.*

9. The failure of the engineer to stop his slowly moving engine which the employee was intending to board is *held* not a proximate cause of the death of such employee, as the engineer was not bound to anticipate that the employee would attempt to put his tools on the pilot or that he would become so overbalanced as to fall or step on another track; the movements of the employee being all unforeseen by and beyond the control of the engineer. *Ibid.*

Defenses: Assumption of risk: Fellow-servant's negligence.

10. While the negligence of a fellow-servant does not constitute a defense under the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149), assumption of the risk does. *Zarcone v. Payne,* 240

11. In accepting employment an employee may presume that his fellow-servants are competent and careful, and he does not assume the risk of their unexpected negligent acts. *Ibid.*

12. An employee who continues at work without protest, with knowledge of the fact that he is exposed to extraordinary hazard by reason of a defective appliance or machine or by reason of the negligent manner in which a co-employee does his work, assumes the unusual risk created. *Ibid.*

13. Whether the negligent practices of a fellow-servant have been of such frequent occurrence as to charge persons of reasonable care and prudence similarly situated with knowledge of the unusual risk arising to those who are working with him, is ordinarily for the jury. *Ibid.*

14. Where the jury would have been warranted from plaintiff's testimony in finding that a co-employee engaged with him in replacing ties on defendant's railroad track had acted in a negligent manner so often that a person of ordinary care and prudence would have known that the disposition and practices of such co-employee constituted an unusual hazard of the work, the court should have submitted the question as to whether the plaintiff assumed the risk. *Ibid.*

Contributory negligence: Effect on damages.

15. Under the federal Employers' Liability Act, contributory negligence of the injured employee, if his negligence and that of defendant proximately concur in causing the injury, is not a complete defense but only a ground for apportionment of damages. *Richter v. Chicago, M. & St. P. R. Co.* 188

FEDERAL SAFETY APPLIANCE ACT. See FEDERAL EMPLOYERS' LIABILITY, 4.

FELLOW-SERVANT DOCTRINE. See FEDERAL EMPLOYERS' LIABILITY, 4, 10, 11, 13, 14.

FINDINGS. See FRAUD, 4. JUDGMENT, 5. SPECIFIC PERFORMANCE, 6.

FIREMEN'S PENSION FUND. See MUNICIPAL CORPORATIONS, 8.

FIXTURES.

See VENDOR AND PURCHASER, 4.

Building erected on land of another.

A barn and foundation for a house constructed upon the lot of another by mistake could not be removed without the consent of the owner of such lot. *Lee v. Bielefeld,* 225

FORECLOSURE. See FRAUD, 1.

FOREIGN CORPORATIONS. See CORPORATIONS, 4–9.

FORFEITURE.

Of stipulated damages. See SPECIFIC PERFORMANCE, 9.
Of franchise. See CORPORATIONS, 4.
Of liquor. See INTOXICATING LIQUORS, 2.

FORGERY. See TRUSTS.

FRAUD.

See COMPROMISE. CORPORATIONS, 3–5. FEDERAL EMPLOYERS' LIABILITY, 3. FRAUDULENT CONVEYANCES. GUARDIAN AND WARD, 2. HUSBAND AND WIFE, 2. TRUSTS.

False representations as to collectibility of note: Damages.

1. In an action for deceit in which the damage was a failure of the maker to pay a note secured by a second mortgage sold

by defendant to plaintiff, allegations in the complaint of the foreclosure of the first mortgage and the sale of the mortgaged property for an amount sufficient only to meet such mortgage, interest, and costs, with other allegations that the mortgagor was not solvent at the time of the foreclosure and has never since been solvent, were sufficient to show damage to plaintiff without showing that he had taken steps to collect the note. *Heal v. Stoll,* 137

2. Where the evidence was conflicting as to representations made by defendants' agent, the findings of the jury are binding on this court. *Ibid.*

3. Whenever there is any doubt as to whether a statement by a vendor as to value is made as an expression of opinion or as a statement of fact, the question must be determined by the jury or the court. *Ibid.*

Reliance on representations.

4. The evidence in this case is *held* sufficient to support findings of the jury that defendants' agent had represented a note as good for its face value and had misrepresented the value of the land securing the note, and that plaintiff had relied on these statements. *Heal v. Stoll,* 137

5. The belief of plaintiff that he was dealing with the principal instead of the agent up to the time of the assignment of the note and the mortgage does not change the relation of principal and agent so as to relieve the principal from liability for misrepresentations of the agent. *Ibid.*

6. Where one of two innocent persons must suffer from the fraud of another, the one who furnished the means to commit or whose negligence caused the wrong to be committed must bear the loss; and a principal is liable for false representations of his agent causing damage to a party with whom the agent deals in the course of business authorized to be carried on by him, regardless of whether the principal knew of the false representations or intended them to be made. *Ibid.*

7. While plaintiff must exercise reasonable care and diligence to avoid loss and minimize damage, it is held that this court cannot set aside an answer of the jury to the effect that the plaintiff did not fail to exercise ordinary care in taking such steps as an ordinarily prudent man would have taken in protecting and securing his second mortgage, as all the circumstances in that regard were doubtless considered by the jury. *Ibid.*

Evidence as to value of lands.

8. In fixing the value of lands the jury is not bound to take the average of estimates of witnesses, but should weigh the opinions of all the witnesses, and in making their determination they were not bound to ignore entirely their own knowledge with respect to the elements which combine to constitute value. *Heal v. Stoll,* 137

FRAUDULENT CONVEYANCES.

See BANKRUPTCY. HUSBAND AND WIFE, 2, 4.

Necessity of grantee having knowledge of fraud.

1. In an action of replevin by a trustee in bankruptcy to recover property transferred by chattel mortgages alleged to be in fraud of creditors, in order to prove fraud it is necessary to show not only that the mortgagor executed the chattel mortgages without adequate consideration or with intent to hinder, delay, or defraud his creditors, but that the mortgagees at the time either knew of such intent or had knowledge of such facts and circumstances as would put a prudent man on inquiry, which if prosecuted with ordinary diligence would lead to a knowledge of such intent. *Fernhaber v. Cream City Cartage Co.* 75

Same: Evidence as to fraud by grantor.

2. The mortgaging of property to the mortgagor's father and mother-in-law did not of itself constitute fraud, but was a circumstance proper to be shown, and calls for closer scrutiny and clearer explanation of the transaction than in case of ordinary transfers. *Fernhaber v. Cream City C. Co.* 75
3. Under sec. 2323, Stats. 1917, making the question of intent in fraudulent conveyances one of fact for the jury, evidence as to the fraudulent intent of the mortgagor is *held* sufficient to go to the jury. *Ibid.*
4. On the cross-examination of a witness, where the question of fraudulent intent is involved, the rules prohibiting leading questions and requiring the best evidence must be greatly relaxed and in many instances ignored; and it is error not to permit an exhaustive and searching cross-examination of the party charged with committing fraud. *Ibid.*

GERRYMANDER. See DRAINS, 3.

GOVERNOR. See CRIMINAL LAW, 8.

GRADE CROSSINGS. See STREET RAILWAYS, 6.

GROSS NEGLIGENCE. See HOMICIDE, 7. STREET RAILWAYS, 6.

GUARDIAN AND WARD.

See WILLS, 7–9.

Jurisdictional facts in guardianship proceedings.

1. The actual existence of a ward is a required jurisdictional fact to make valid an order in guardianship proceedings in county court under sec. 3962, Stats. *Guardianship of Reeve,* 579
2. The county court, on discovering that a surviving wife had perpetrated a fraud in passing off as the issue of her deceased husband a baby not in fact the husband's child, for whom the court had appointed a guardian, will order funds in the hands of the guardian, acquired by the ward as heir at law

of the husband, to be given to the surviving wife as sole heir of the husband, notwithstanding the wife had perpetrated such fraud, since the guardianship proceedings are void for want of a ward, making it necessary for the court to dispose of the funds in the hands of the guardian to the persons entitled thereto, and since the surviving wife, as sole heir of the husband, is the only person entitled thereto. *Ibid.*

HABEAS CORPUS. See CRIMINAL LAW, 7, 8.

HARMLESS OR PREJUDICIAL ERROR. See APPEAL, 20. CRIMINAL LAW, 11. DISORDERLY HOUSE, 6, 8. HOMICIDE, 6, 8. JUDGMENT, 5. NEGLIGENCE, 2, 3. STREET RAILWAYS, 1. TRIAL, 2, 5, 6, 11.

HIGHWAYS.

See AUTOMOBILES. DRAINS, 8. MUNICIPAL CORPORATIONS, 1–4.

Laying out: Participation by landowner.

1. Where a landowner was present when town supervisors laid out a highway, suggested several changes in its course over his premises, which were made, assisted in staking it out, and did not object thereto except as to damages, and at the trial of his action to enjoin opening the highway objected to evidence as to his participation in selecting the route because it affirmatively appeared that it had been laid out in accordance with the petition, he could not be heard to assert any claim on account of deviations of the highway as laid out on his lands from the route described in the petition and notice. *Genske v. Veith,* 390

Same: Agreement as to damages: Appeal.

2. In a proceeding to lay out a highway under sec. 1270, Stats., an agreement between the town board and a property owner as to the damages sustained by him is an award of damages although not arrived at by assessment; and sec. 1286*a*, Stats., authorizes an appeal by a taxpayer to the county judge from an award of damages whether the amount was ascertained by assessment or agreement. *State ex rel. Plowman v. Lear,* 406

HOLDING OVER. See SHERIFFS.

HOMESTEAD. See DEEDS, 1.

HOMICIDE.

See CRIMINAL LAW, 5, 7, 8.

Murder: Necessity of malice aforethought.

1. In this state murder is recognized, treated, and punished as an offense by the common law, of which the statute is merely declaratory. *In re Carlson,* 538

2. The word "wilful" in an information does not supply the necessary element of premeditation required to charge murder in the first degree, the words "malice aforethought" being required by the statute as well as by the common law. *Ibid.*

3. Although sec. 4660, Stats., provides that in indictments or informations for manslaughter it shall be sufficient to charge that the accused did feloniously kill and slay the deceased, an information may be good though it does not use the language of that section; and an allegation that the petitioner aided another in wilfully and feloniously murdering the deceased, which includes every element in the statutory language, charges the defendant with first-degree manslaughter. *Ibid.*

Same: Sufficiency of evidence.

4. In a prosecution for murder, evidence conclusively establishing that the deceased, the wife of the defendant, had met her death by blows upon the head, and that her body was placed in the basement of their home before a fire which destroyed the house had touched the body, together with evidence pointing to a number of more or less suspicious circumstances connected with the conduct of the defendant, is *held* to sustain a conviction of murder in the first degree. *Meyer v. State,* 184

5. Where the accused disclaimed all knowledge of the crime, so that no room was left for any question of accident, heat of passion, or other inadvertence, the defendant was either guilty of murder in the first degree or not guilty. *Ibid.*

6. A statement of the district attorney, in arguing to the jury, that "There isn't any of the crimes the Huns have committed that is more atrocious than the crime this man has committed," was not prejudicial error as asserting that the accused was not only guilty, but that he was guilty of a most heinous crime, as the characterization of the crime was a matter upon which minds might well differ. *Ibid.*

Manslaughter in fourth degree: Violation of automobile statutes.

7. A conviction of manslaughter in the fourth degree was proper where the defendant, though not guilty of gross negligence under secs. 4337, 4363, 4365, 4367, Stats., inadvertently ran into a stationary motor truck with an automobile while violating sub. 1, sec. 1636—52*a*, relating to lights on motor vehicles, and the statute relating to speed, the term "involuntary" signifying inadvertence, and the term "culpable negligence" not requiring gross negligence. *Clemens v. State,* 289

8. In a prosecution for manslaughter in the fourth degree, arising out of a violation of the statutes relating to lights on motor vehicles, a conviction was not reversed where both counsel and court were under the erroneous impression that sec. 1636—52, Stats. 1917, was in effect, instead of sub. 1, sec. 1636—52*a*, Stats. 1919, no exceptions having been taken to the instructions of the court nor proper instructions asked, and the Statutes of 1919 not being more favorable to the accused than the Statutes of 1917, and plaintiff in error having admitted that his headlights threw a light ahead not to exceed forty feet. *Ibid.*

HOSPITALS. See PHYSICIANS AND SURGEONS, 1, 2.

HOUSE OF ILL FAME. See DISORDERLY HOUSE.

HUSBAND AND WIFE.

See DEEDS. DISORDERLY HOUSE. DIVORCE.

Rights of wife in husband's property.

1. A wife has no vested or *quasi*-vested right in the husband's personal property during his lifetime, and he may dispose thereof voluntarily, though for the purpose of defeating the wife's right as widow, provided the disposition is not indicative of some other fraud on her than that arising from his absolute transfer of property to avoid her having an interest therein after his death. *Sederlund v. Sederlund,* 627
2. Where a husband makes a colorable transfer of his personal property to another under such circumstances as would in law still leave the title in himself, the transfer will be deemed fraudulent as to the wife's right as a widow, and may be set aside at her instance. *Ibid.*
3. During coverture the husband owes the duty of reasonable maintenance and support towards his wife, and a transfer of his personal property for the purpose of avoiding such obligation will be set aside during the lifetime of the husband at the instance of the wife. *Ibid.*
4. A husband's transfer of his personal property, representing the earnings of himself and his former wife and their children, to such children at a time when he was able to be about and to transact business, though suffering from an incurable disease, is valid as against his second wife, to whom he had been married only a short time, in the absence of proof as to undue influence and in view of the fact that he had transferred a portion of the property to the wife. *Ibid.*

INADEQUATE DAMAGES. See DAMAGES, 4.

INCOMPETENTS. See INSANE PERSONS.

INDICTMENT AND INFORMATION.

See CRIMINAL LAW, 3–6, 8. HOMICIDE, 2, 3.

Sufficiency: Offense charged in words of statute.

1. An indictment is sufficient which states the crime in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense charged really is. *Finsky v. State,* 481
2. Under sec. 1569—8, Stats. 1919, providing that no person shall have in his possession or under his control in the building in which he conducts his business of selling or dispensing non-intoxicating beverages any intoxicating liquor, an information charging the offense substantially in the language of the statute was sufficient within sub. (4), sec. 4658, requiring the offense to be set forth with such degree of certainty that the court may pronounce judgment, as the statute sufficiently individuates the offense. *Ibid.*

3. Though sec. 1569—3, Stats. 1919, after defining intoxicating liquor, provides that, if Congress shall by a valid act define such words, such definition shall be adopted, an information charging defendant with having intoxicating liquors as defined by such section in his possession and under his control, in violation of sec. 1569—8, need not specifically allege that Congress by a valid act has defined the words "intoxicating liquor" as used in the Eighteenth amendment to the federal constitution, as the court takes judicial notice of the constitution and statutes of the United States. *Ibid.*

INDORSEMENTS. See CONTRACTS, 2.

INFANTS. See DIVORCE, 3.

INFORMATION. See INDICTMENT AND INFORMATION.

INSANE PERSONS.

Sale of lands of incompetent: Price.

Where an interest in real estate of an incompetent was offered for sale to a school district at a certain price, it was the duty of the court to accept a *bona fide* offer of a substantially higher price from a third party, though it was of the opinion that such offer was made for the sole purpose of hindering the school district and causing it expense, the interest of the incompetent being the dominant consideration. *In re Anderson,* 459

INSOLVENCY. See EXECUTORS, 1, 3. FRAUD, 1.

INSPECTION OF INSTRUMENTS.

Right to inspection: When inspection granted.

1. To entitle a party to an inspection or production of writings under sec. 4183, Stats., they must be in the possession or control of the adverse party; and if it clearly appears that all the correspondence material to the inquiry was produced the objects of the statute are fully met, and an order for inspection and production will not be granted. *Worthington P. & M. Co. v. Northwestern I. Co.* 35
2. It is essential to the right of inspection that the production or inspection sought is material to the issues involved and affects the merits of the action, but a general allegation of materiality and necessity is insufficient, as facts must be stated showing how and why the discovery or inspection is material; and an order therefor will be denied where the application appears to be made solely for fishing purposes. *Ibid.*
3. In an action for damages for the wrongful cancellation of a contract and refusal to deliver a portion of the goods, where defendant's secretary, under adverse examination pursuant to sec. 4096, Stats., produced a written memorandum and correspondence showing that plaintiff had requested a cancellation, to which defendant expressed its willingness on the payment of certain sums by way of adjustment, but that such

offer was never accepted and no agreement as to adjustment ever arrived at, and that defendant's cancellation was not based on such negotiations, such ineffectual attempts at cancellation were immaterial and need not be considered on plaintiff's petition for inspection or production of correspondence passing between defendant and its agent, with whom all of plaintiff's communications were had. *Ibid.*

4. Where it appeared from the adverse examination of defendant and from his testimony at the hearing on the petition for inspection, together with that of defendant's counsel, that neither had possession of any correspondence not already produced with reference to such cancellation, and plaintiff, whose allegations and supporting affidavit of counsel were based on information and belief only, could not specify any particular correspondence, the court did not abuse its discretion, under sec. 4183, Stats., in denying plaintiff's petition for inspection. *Ibid.*

5. Nor did the court abuse its discretion in refusing to grant an inspection of letters between defendant and its agent as to an alleged agreement to withhold shipments, where no such letters were in fact shown to exist and the materiality thereof, if any, was not shown. *Ibid.*

INSTRUCTIONS TO JURY. See DAMAGES, 7. DISORDERLY HOUSE, 8. HOMICIDE, 8. INTOXICATING LIQUORS, 3. NEGLIGENCE, 2, 3. STREET RAILWAYS, 5. TRIAL, 7, 11.

INSURANCE.

See PLEADING, 3. VENUE, 1, 2.

Division of commission by agents of same company.

1. Sub. 2 (e), sec. 1955*o*, Stats., relating to division of commissions by insurance agents, is construed not to forbid two licensed agents of the same company from assisting each other in their work or prevent concerted action by them in procuring insurance from the same person, and the commissions so earned will be divided in accordance with a prior agreement of the agents. *Diefenbach v. Jarett,* 70

2. In an action by one insurance agent against another for money had and received, on the ground that the defendant had received from the company commissions which the plaintiff helped to earn, plaintiff must prove that defendant received the money. The record being silent as to this fact, the case is remanded to the trial court to take testimony and determine the question. *Ibid.*

INTEREST. See CONTRACTS, 7, 8. SALES, 3.

INTERSTATE COMMERCE. See CARRIERS, 2, 3. FEDERAL EMPLOYERS' LIABILITY.

INTERURBAN RAILWAYS. See STREET RAILWAYS.

INTOXICATING LIQUORS.

See DISORDERLY HOUSE, 6. INDICTMENT, 2, 3.

Right of prohibition officer to make search: Property in unlawful liquor.

1. Under sec. 1569—8, Stats., giving the prohibition commissioner or his deputies the right of access at all reasonable hours to premises occupied by any retail dealer in nonintoxicating beverages, search could be made without warrant or without license of the dealer, and liquor found by a deputy prohibition commissioner concealed on the premises of such a dealer was detected and seized by him pursuant to legal authority, which the legislature, under the police power, could delegate. *Finsky v. State,* 481
2. Under sec. 1569—13, Stats., providing for the forfeiture of liquors kept by dealers in nonintoxicating beverages in the building where such business is conducted, such liquor when seized became the property of the state, which thereby became vested with the right of property and possession thereof, and the liquor could be offered in evidence in a prosecution against the dealer. *Ibid.*
3. An instruction that the law presumed defendant to be innocent and that the "doubt" remained in his favor throughout the trial until removed by evidence which convinced the jury of his guilt beyond all reasonable doubt, was erroneous; but from an examination of the whole proceeding under sec. 3072*m*, Stats., this court is convinced that the error was not prejudicial. *Ibid.*

INVITEES. See APPEAL, 16.

JAIL LIMITS. See EXECUTION.

JITNEYS. See AUTOMOBILES, 9. CARRIERS, 1.

JOINDER OF PARTIES. See ACTION.

JOINT RATES. See CARRIERS, 2.

JUDGES.

See BILL OF EXCEPTIONS, 3. OFFICERS.

Conviction of felony: Ouster: Reversal of conviction.

1. A county judge convicted under the federal espionage act of June 15, 1917, and thereby disqualified from holding office by sec. 3, art. XIII, Const., and ousted from his office by sec. 17.02, Stats. 1917, was not, on reversal of such conviction, following stay of sentence, entitled to salary for the period of time he had been so ousted, under sec. 4935, providing that the office of a public officer who had been convicted and sentenced to state prison shall be deemed vacated from the time of commitment to prison and that the officer, on reversal of the judgment, shall be restored to office with all its rights and emoluments. *Becker v. Green County,* 120

2. Sec. 14, ch. 362, Laws 1919, providing for the consolidation of sec. 4935, Stats. 1917, with other sections to constitute sub. (5), sec. 17.03, which took effect after plaintiff (a county judge) was sentenced but before judgment of conviction was reversed, and providing also for the restoration to office of a convicted public officer on reversal of judgment, does not entitle an officer who has been ousted from office by conviction under laws then existing to restoration of office, the legislature having no more right to restore an ousted officer than to provide for the induction of an officer into office in the first instance. *Ibid.*

Same: Salary.

3. The question whether plaintiff was entitled to salary for the period he served as county judge after his conviction and before his successor qualified and assumed the office, not having been presented to the court during the trial, cannot be urged as a ground for a new trial or for a reversal of the judgment; but, without expressing an opinion on the question, it is *ordered* that the judgment in the case be without prejudice to plaintiff's right in respect to the salary for such period and will not be *res adjudicata* in proceedings instituted for a recovery thereof. *Becker v. Green County,* 120

JUDGMENT.

See EXECUTORS, 5. NEW TRIAL, 8.

Form: Oral judgment.

1. It is not necessary that a judgment of dismissal to which a verdict entitles a defendant be in writing, an oral judgment being sufficient. *Kausch v. Chicago & M. E. R. Co.* 21

Same: Judgment by consent.

2. A judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the court. *Duras v. Keller,* 88
3. The agreement of the parties stands as a final disposition of their rights unless vacated or set aside in the manner provided by law. *Ibid.*
4. An entry on the record reciting the settlement of an action, and, by consent of the parties, ordering it dismissed on the merits, though in form an order, was in fact a final judgment under sec. 2882, Stats., defining a judgment as the final determination of the rights of the parties. *Ibid.*
5. A judgment by consent, though not based upon a verdict or findings of the court, operates to waive any defects in the pleadings or any irregularities or grounds of objection which would have constituted error if the judgment had been rendered upon a trial. *Ibid.*
6. Where the parties to an action made a settlement under which defendant was to pay plaintiff a sum of money, and by consent of the parties the court entered a judgment dismissing the action on the merits, the court could not, without vacat-

ing such judgment, enter another judgment in plaintiff's favor for the amount alleged to have been agreed upon in the settlement, as under secs. 2882 and 2883 more than one judgment cannot be entered in an action. *Ibid.*

7. The alleged failure of the defendant to carry out his promise upon which the settlement was made could not, in the absence of a stipulation to that effect, constitute ground for vacating the judgment of dismissal entered by consent. *Ibid.*

Relief from judgment obtained through perjury: Laches.

8. A court of equity will relieve from a judgment obtained through perjury where the defendant comes into court with clean hands and has been guilty of no laches; but it demands a very high degree of proof before it will restrain the enforcement of a judgment upon that ground. *First Nat. Exch. Bank v. Harvey,* 64

9. In an action in this state to enforce judgments rendered in the courts of Ohio (based upon promissory notes), defendant put in a counterclaim for equitable relief on the ground that the judgments were procured by perjury, which contained no allegation that he appeared in the original action in any manner, that he introduced any defense whatever, that he used due diligence or did anything to challenge the *bona fides* of the plaintiff's title to the notes, or to put it to its proof upon the question of whether it was a holder in due course. *Held,* defendant was guilty of laches, and a demurrer to his counterclaim was properly sustained. *Ibid.*

JURISDICTION. See CONTRACTS, 2. CORPORATIONS, 6–9. COURTS, 2. DRAINS, 9–11, 13. EXECUTORS, 1–4. GUARDIAN AND WARD, 1. NEW TRIAL, 6, 9. SPECIFIC PERFORMANCE, 7. WASTE, 3–5.

JURY.

See FRAUD, 8. TRIAL, 11.

Qualifications of juror.

That a juryman who heard an action tried and joined in a verdict, on a later day, on his *voir dire* examination in another personal injury action, in answer to a question as to whether he would start out with any idea that "no matter whether there is no blame on anybody's part or not, if there was no blame on the plaintiff's part, they ought to get some money," stated "Why, yes; he is entitled to some money," did not show a disqualification, the question being indefinite and uncertain and it being doubtful what part he was attempting to answer. [The question whether a disqualification of a juror subsequently appearing might be ground for new trial, not passed upon.] *Heintz v. Schenck,* 562

LACHES. See DRAINS, 13. EQUITY. JUDGMENT, 8, 9. WILLS, 7.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT. See DEEDS, 1. PHYSICIANS AND SURGEONS, 1.

LATENT DEFECTS. See SALES, 15.

LAW OF THE CASE. See APPEAL, 13, 14, 16.
LAW OF THE ROAD. See AUTOMOBILES.
LEADING QUESTIONS. See FRAUDULENT CONVEYANCES, 4.
LEASE. See BROKERS, 3. PHYSICIANS AND SURGEONS, 1.
LIFE ESTATES. See DRAINS, 6. WASTE, 5. WILLS, 2, 6.
LIMITATION.
Of actions. See CARRIERS, 3. CONTRACTS, 2. EMINENT DOMAIN. WILLS, 8.
Of remedies. See FEDERAL EMPLOYERS' LIABILITY, 2.
LIQUIDATED DAMAGES. See DAMAGES, 1. SPECIFIC PERFORMANCE, 9.

LOST INSTRUMENTS.

Defense of payment: Burden of proof.
In an action against a surety on a lost note, where the provisions of secs. 4190 and 4191, Stats., were complied with, and the answer of the defendant admitted that the note was lost, the burden of establishing the defense of payment was upon the defendant, the same as if the note had in fact been produced. *Kessler v. Reese,* 386
MALICE AFORETHOUGHT. See HOMICIDE, 2.
MALPRACTICE. See PHYSICIANS AND SURGEONS.

MANDAMUS.

Effect of demurrer to return.
A demurrer to the return to an alternative writ of *mandamus* makes the allegations therein contained verities. *State ex rel. Potrykus v. Schinz,* 646
MANSLAUGHTER. See HOMICIDE, 3, 7, 8.
MARRIED WOMEN. See HUSBAND AND WIFE.

MASTER AND SERVANT.

See FEDERAL EMPLOYERS' LIABILITY. RAILROADS. WORKMEN'S COMPENSATION.
Duty of master to furnish safe appliances.
An employer must exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of his employee, but is not required to furnish the latest, best, and safest appliances, or to discard standard appliances upon the discovery of later improvements, provided those in use are reasonably safe. *Westgard v. C., M. & St. P. R. Co.* 636
MAXIMS.
Equality is equity, 576.
He who comes into a court of equity must come with clean hands, 597.
Res ipsa loquitur, 600, 605.
Res judicata pro veritate accipitur, 121, 137.

MECHANICS' LIENS. See SALES, 2.

MISREPRESENTATIONS. See FRAUD.

MISTAKE. See ARBITRATION AND AWARD. COMPROMISE. DRAINS, 11. FIXTURES.

MODIFICATION OF CONTRACT. See CONTRACTS, 12, 13. SALES, 5.

MONEY HAD AND RECEIVED. See INSURANCE, 2. MUNICIPAL CORPORATIONS, 11–14. SALES, 7.

MORTGAGES. See FRAUD, 1. TRUSTS.

MOTION. See NEW TRIAL, 6. VENUE, 4.

MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

See AUTOMOBILES. CONSTITUTIONAL LAW. PUBLIC UTILITIES. SCHOOLS.

Vacation of streets: Accepting deed to street conditioned on vacating another street.

1. Sec. 926—125*q*, Stats., requiring an action to set aside any final order of any circuit court, or action of the common council of a city, for the vacation of a street to be begun within six months from the publication of the statute, and validating such attempted vacation at the end of such six months, is one of limitation and repose and requires a fair and reasonable construction to carry out its manifest purpose of putting a quietus on subsequent attempts to overturn proceedings in regard to the vacation of streets. *Madison v. Fuller & Johnson Mfg. Co.* 462
2. Since the legislature has the primary power as to the laying out and vacating of public highways, even though exercised through the common council, the legislature can ratify that which was attempted to be done, or was imperfectly done, at some prior time, as it did by sec. 926—125*q*, Stats. *Ibid.*
3. The fact that a complaint to require defendant to remove obstructions from a street omitted any reference to a judgment vacating the street rendered subsequent to the erection of buildings thereon under permit by the city, does not affect the character of the action, which is an attack on the vacation of the street. *Ibid.*
4. Where the common council of a city accepted a deed to property for a street, which deed was expressly conditioned on the vacation of another street, its acceptance of the deed was equivalent to a vacation of such street, which action became binding, if not attacked within six months, under said sec. 926—125*q*. *Ibid.*

City attorneys: Milwaukee: "Regular municipal election."

5. Ch. 505, Laws 1919, repealing sec. 4 of ch. 35 of the Laws of 1889 (providing that the term of office of the city attorney of Milwaukee shall be four years) and providing that the

term of office of city attorneys in cities of the first class shall be two years, to begin in 1922 and end in 1924, and that the city attorney shall be elected at the regular municipal election in any such city to be held on the first Tuesday in April, 1922, required the holding of an election for the office of city attorney in April, 1922, at which time the preceding term expired. *State ex rel. Williams v. Kaempfer,* 283

6. Said ch. 505, Laws 1919, is general, though in its practical application it refers only to the city of Milwaukee, and is not violative of sec. 18, art. IV, Const., in that it embraced more than one subject on its face and in its title, as all that is contained in the chapter is germane to its stated purpose. *Ibid.*

7. City attorneys of cities of the first class are regular elective officers, and under ch. 505, Laws 1919, requiring city attorneys in cities of the first class to be elected at the regular municipal election to be held on the first Tuesday in April, 1922, an election at which the city attorney is the only officer to be elected is a "regular municipal election" within the meaning of the statute. *Ibid.*

Firemen's pension: "Dependent daughter."

8. Under secs. 9 and 10, ch. 87, Laws 1907, relative to a pension fund created for firemen of the city of Milwaukee, a daughter of a deceased member who is a normal, healthy child over the age of eighteen years is not a "dependent daughter" within the statute nor entitled to a pension, although her mother is dead and she has no property of her own. *State ex rel. Houlahan v. Board of Trustees, etc.* 31

Municipal contracts: Invalid contracts: Ratification: Taxpayer's action.

9. Sec. 925—91*a*, Stats. (sec. 1, ch. 10, Laws 1920, Spec. Sess.), validating any contract for the purchase of concrete posts in connection with a municipal lighting system of any city of the first class, applied only to the city of Milwaukee, and could never apply to any other city, and was in violation of secs. 31, 32, art. IV, Const., as special legislation. *Neacy v. Drew,* 348

10. Sec. 959*w*, Stats. 1919, providing for the ratification, validation, and confirmation of contracts which the common council of a city had authority to make, does not permit the ratification of any part of a contract void because the furnishing of the article provided for under it involved its manufacture by patented process, in respect to which the provisions of the city charter had not been complied with. *Ibid.*

11. When a taxpayer brings an action to restrain the performance of an alleged unlawful contract entered into by city officials, and pending the determination of the action the contract is performed, moneys expended by the city under such contract may be recovered if the court of last resort decides it to be invalid. *Ibid.*

12. The bringing of such an action is favored in law and equity; and the complaint is not subject to demurrer as improperly joining two causes of action, in that it prayed that attorney's fees be paid out of the fund sought to be recovered. *Ibid.*

Same: Recovery of money illegally paid.

13. A corporation entering into a contract with a city to furnish an article capable of being manufactured only by patented machines, in violation of the charter of the city and with full knowledge of the invalidity of the contract, was in no position to invoke the doctrines of equity in an action by a taxpayer in behalf of the city to recover money illegally paid to it under the contract. *Neacy v. Drew,* 348

14. Money illegally paid by officials of a city under such a contract could be recovered not only from the company receiving it, but also from the officials responsible for the illegal payment. *Ibid.*

MURDER. See CRIMINAL LAW, 5, 7, 8. HOMICIDE.

NEGLIGENCE.

See APPEAL, 13, 15, 16. AUTOMOBILES. CARRIERS, 1. ELECTRICITY. FEDERAL EMPLOYERS' LIABILITY. HOMICIDE, 7. MASTER AND SERVANT. PHYSICIANS AND SURGEONS, 1, 2. PLEADING, 3. RAILROADS. STREET RAILWAYS. TRIAL, 2. WORKMEN'S COMPENSATION.

What constitutes negligence.

1. Ordinary negligence consists of a want of that care and prudence that the great majority of mankind exercise under the same or similar circumstances. *Clemens v. State,* 289

Gross negligence. See HOMICIDE, 7. STREET RAILWAYS, 6.

Concurring negligence. See STREET RAILWAYS, 3.

Imputed negligence. See APPEAL, 15.

Contributory negligence. See APPEAL, 15, 16. AUTOMOBILES. NEGLIGENCE. NEW TRIAL, 3. STREET RAILWAYS, 4–6. TRIAL, 9–11.

Proximate cause: Instructions.

2. Error because of the omission of the word "probably" between the words "might" and "produce" in an instruction on proximate cause with reference to plaintiff's contributory negligence, "It must be a cause which the person responsible for it ought reasonably foresee might produce some such result," is prejudicial only to plaintiff and therefore not ground of complaint by defendant. *Kausch v. Chicago & M. E. R. Co.* 21

3. Error in a statement in an instruction on proximate cause with reference to plaintiff's contributory negligence, "It likewise must have been the cause of the result without any other outside cause coming in to interfere and produce the result," was prejudicial to defendant, as its natural import would be

to convey the impression that to find contributory negligence the jury must find that the negligence of the plaintiff was the cause of the injury without reference to any other cause. *Ibid.*

Questions for jury.

4. The question whether a defendant was guilty of any negligence which proximately caused plaintiff's injury is for the jury, if there is any credible evidence which to a reasonable mind would support any inference of negligence. *Isgro v. Plankinton Packing Co.* 507

5. Unless it can be said that contributory negligence on the part of the plaintiff is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, the proper inferences to be drawn must be determined by the jury; but where plaintiff's own evidence conclusively shows contributory negligence on his part a nonsuit will be granted. *Kornwolf v. Milwaukee E. R. & L. Co.* 160

Res ipsa loquitur. See ELECTRICITY.

NEW TRIAL.

See APPEAL, 6, 15. JUDGES, 3. PHYSICIANS AND SURGEONS, 2. PLEADING, 3.

Discretion of court.

1. An order granting a new trial without stating the grounds therefor will not be disturbed unless the court abused its discretion, the presumption being, since the court imposed costs as a condition, that the order was granted because of errors by the jury or because the verdict was contrary to the weight of the evidence, costs not being imposed if a verdict is set aside for errors of the court. *John v. Pierce,* 220

2. Where opposite conclusions may reasonably be drawn from the evidence, the granting of a new trial on the ground that the verdict was against the weight of the evidence is not an abuse of discretion. *Ibid.*

3. Although this court on a former appeal decided that the negligence of the driver of an automobile in which plaintiff was riding was a defense, but that he was not guilty of contributory negligence as a matter of law, the trial judge, taking a different view of the merits of the action on retrial, did not abuse his discretion in setting aside a verdict for the defendant and granting a new trial on the ground that the verdict was against the weight of the evidence, and his action will not be disturbed, the evidence being such that conflicting conclusions might be reached by different persons. *Ibid.*

Cumulative evidence: Lack of diligence.

4. Where in an action by the buyer of potatoes against the sellers the question was whether the sellers had been notified within a reasonable time of the alleged frozen condition of the potatoes, testimony was given on behalf of the sellers as to the time within which the frozen condition of potatoes would become manifest, and one of their witnesses testified

as to an experiment he had performed, a motion for a new trial on the ground of newly-discovered evidence obtained by putting frozen potatoes in a temperature of 35 to 40 degrees and observing how long it was before they indicated they had been frozen, will be denied, as the proposed evidence is merely cumulative to oral testimony produced at the trial. *Seemann v. Kastner,* 51

5. Where defendants might have examined plaintiff before the trial, and from information so derived would have had opportunity to present evidence of an experiment with frozen potatoes, and one of the defendants made frequent visits to the place of business of the seller and could have seen how the potatoes were stored, the motion for a new trial was properly overruled because of the lack of the diligence essential in such an application. *Ibid.*

Deciding motion after sixty days: Extension: Newly-discovered evidence.

6. Under sec. 2878, Stats., requiring a motion for a new trial on the minutes of the court to be made and heard within sixty days unless the court extends the time, where within the time limit the court adjourned the hearing of the motion to a date beyond, the court had jurisdiction to act on the motion at the latter date, especially where the party attacking the granting of the motion was the one who obtained the adjournment. *State ex rel. Potrykus v. Schinz,* 646

7. Said sec. 2878 applies to a case in which a special verdict is rendered. *Ibid.*

8. An oral order actually made, adjourning the hearing on a motion for a new trial, became the order of the court as effectively as though entered in writing. *Ibid.*

9. Where the argument and discussion on a motion for a new trial was wholly on the ground of newly-discovered evidence, and it was because thereof that the court granted a new trial in its discretion, the trial court had jurisdiction, under sec. 2879, Stats., to grant the motion at any time within one year. *Ibid.*

Excessive damages as ground for new trial. See DAMAGES, 5.

NONSUIT. See NEGLIGENCE, 5.

OBITER DICTUM. See APPEAL, 9–12.

OCEAN CARRIERS. See CARRIERS, 2, 3.

OFFER. See CONTRACTS, 5.

OFFICERS.

See JUDGES. MUNICIPAL CORPORATIONS, 14. SCHOOLS, 2–4. SHERIFFS.

Officer ousted by erroneous conviction: Recovery of salary: Infamous crime.

1. A public officer who had been erroneously convicted of a crime which works an ouster from his office cannot under the common law, upon reversal of such erroneous judgment, recover salary for the time during which he was excluded from the

office, his rights of recovery, if any, being by virtue of statutory law. *Becker v. Green County,* 120

2. An "infamous crime" within the meaning of sec. 3, art. XIII, Const., making a person convicted thereof ineligible to hold public office, and sec. 17.02, Stats. 1917, providing for a vacancy in office upon conviction of an officer of an "infamous crime," is a crime punishable by imprisonment in the state prison. *Ibid.*

Officers of private corporations. See CORPORATIONS.

OPINION EVIDENCE. See EVIDENCE, 1, 2.

ORDER. See NEW TRIAL, 8.

ORDINANCES. See CONSTITUTIONAL LAW, 1.

OUSTER. See JUDGES. OFFICERS.

PARDON. See CRIMINAL LAW, 8.

PARENT AND CHILD. See DEEDS. DIVORCE, 1–3.

PARTIES. See WASTE, 2, 3, 5.

PARTY-WALLS. See EASEMENTS, 2.

PATIENT. See ASSAULT. PHYSICIANS.

PAYMENT. See CONTRACTS, 7, 8. LOST INSTRUMENTS. RELEASE, 2.

PENSION FUND. See MUNICIPAL CORPORATIONS, 8.

PERJURY. See JUDGMENT, 8.

PERSONAL INJURIES. See ASSAULT. AUTOMOBILES. CARRIERS, 1. ELECTRICITY. FEDERAL EMPLOYERS' LIABILITY. JURY. MASTER AND SERVANT. NEGLIGENCE. PHYSICIANS AND SURGEONS, 1, 2. PLEADING, 3. RAILROADS. RELEASE. STREET RAILWAYS. WORKMEN'S COMPENSATION.

PERSONAL PROPERTY. See DIVORCE, 1. EXECUTORS. FIXTURES. FRAUDULENT CONVEYANCES. GUARDIAN AND WARD, 2. HUSBAND AND WIFE, 1–4. INTOXICATING LIQUORS, 2, 3. JUDGMENT, 9. LOST INSTRUMENTS. PRINCIPAL AND AGENT. SALES. WILLS.

PERSONAL REPRESENTATIVES. See EXECUTORS.

PHYSICIANS AND SURGEONS.

See ASSAULT. DAMAGES, 5, 7.

Malpractice: Liability of hospital leasing to physician.

1. In an action against a hospital and a physician for injuries to a patient while under the physician's care in such hospital, in which the hospital denied having operated, directed, or controlled the hospital at the time of such injuries, evidence that the defendant hospital had leased the premises to the physician and that it was merely a lessor of the premises and in no way connected with the treatment and care of the patient is admissible. *Kuglich v. Fowle,* 60

2. Since evidence tending to show the true relationship of the defendants was improperly excluded, it is impossible to say

what the result of the trial would have been if the evidence had been admitted, and a new trial is therefore awarded to both defendants. *Ibid.*

Compensation of physician: Defective work: Competent witnesses.

3. A dentist who performs services for a patient in a good, workmanlike manner and in accordance with the recognized and established practice of those of the same profession in his locality, is entitled to the reasonable value of such services. *Holsapple v. Scofield,* 649
4. The issue in such a case is one upon which expert rather than lay evidence is necessary. *Ibid.*
5. In an action for services in extracting teeth and making an artificial set, where the uncontradicted evidence of expert witnesses was to the effect that satisfactory results could not be expected during the short time defendant attempted to use the teeth, and defendant herself testified that she refused to try them further, a verdict for the defendant should have been set aside and plaintiff's motion for judgment granted. *Ibid.*

PLEADING.

See ACTION. APPEAL, 19. DRAINS, 7. FEDERAL EMPLOYERS' LIABILITY, 3. TRIAL, 3, 4. VENUE, 4.

Demurrer: Effect. See MANDAMUS.

1. Upon demurrer it must be assumed that the allegations in a complaint are true. *Neacy v. Drew,* 348
2. A demurrer to an answer has the effect of presenting the complaint itself for consideration. *State ex rel. Williams v. Kaempfer,* 283

Amendment of pleading: Discretion of court.

3. Where a liability insurer, joined as a defendant with an automobile driver in an action for injuries to and the subsequent death of plaintiff's husband, defended the action, the insurer's attorney representing both the insurer and the insured, and no concealment was practiced upon the insurer and no claim made by it that it was not liable because the injuries had been inflicted by a car substituted for that described in the policy until late in the course of the trial, the denial of an application after new trial ordered to allow an amendment to enable the insurer to plead that its policy did not cover injuries inflicted by the substituted car, was within the discretion of the court. *Ehlers v. Gold,* 336

Counterclaim. See APPEAL, 8. JUDGMENT, 9. SALES, 11.

Pleading in criminal cases. See INDICTMENT.

POWER COMPANIES. See ELECTRICITY.

PRESUMPTIONS. See APPEAL, 20. DISORDERLY HOUSE, 2, 4, 5. NEW TRIAL, 1. RELEASE, 2. SALES, 11.

PRICE. See SALES. SPECIFIC PERFORMANCE, 8.

PRINCIPAL AND AGENT.

See CORPORATIONS, 7–9. FRAUD, 2, 4–6. INSURANCE. VENUE, 1.

Use by agent of principal's money: Conversion.

1. The defendant, who advised the plaintiff to invest in the stock of a supposed corporation, and, under directions to make such an investment and bring plaintiff the certificate of stock, received moneys which he deposited in his bank to his private account and later paid to the agent of the purported corporation, taking the receipts therefor in his own name and not delivering to plaintiff any certificate, is guilty of conversion. *Regas v. Helios,* 56
2. Money which has been intrusted to an agent for a special purpose and to be used in a particular manner is converted if the agent disposes of the property in a way or for a purpose not authorized, in a manner adverse to the owner, and inconsistent with his right of dominion. *Ibid.*

PROBATE COURTS. See COURTS. EXECUTORS.

PROCEDURE in criminal cases. See CRIMINAL LAW.

PROHIBITION COMMISSIONER. See INTOXICATING LIQUORS.

PROXIMATE CAUSE. See APPEAL, 15. ELECTRICITY. FEDERAL EMPLOYERS' LIABILITY, 4–9. NEGLIGENCE, 2, 3. STREET RAILWAYS, 3. TRIAL, 9, 10. VENDOR AND PURCHASER, 4.

PUBLIC UTILITIES.

See CARRIERS. RAILROADS.

Proceeding to acquire waterworks: Discontinuance.

1. Under sec. 1797*m*—81*a*, Stats. (created by ch. 393, Laws 1917), authorizing any municipality having "heretofore" determined to acquire an existing waterworks plant to discontinue proceedings to that end, and sub. (22), sec. 4971, defining "heretofore" in a statute as meaning any time previous to the day when the statute shall take effect, a municipality is not authorized to discontinue proceedings before the railroad commission for the acquisition of a waterworks system where such proceedings were instituted by it after the act of 1917 took effect. *Milton v. McGowan Water, L. & P. Co.* 658
2. The amendment of sec. 1797*m*—81*a*, Stats., by ch. 658, Laws 1919, by the addition thereto of sub. 3, prohibiting the institution of a second proceeding to acquire a public utility by a municipality within four years after the discontinuance of the last prior proceeding, does not change the effect of the section as originally enacted in 1917, authorizing the discontinuance of such proceedings only if they had been instituted before the taking effect of the act of 1917. *Ibid.*
3. Though the proceeding to acquire a waterworks system might, in the absence of any statute showing legislative intent to the contrary, be discontinued at any time before the right of the owners of the utility to compensation has become abso-

lute, sec. 1797*m*—81*a*, Stats., has limited the right to discontinue to such proceedings as were begun prior to the enactment of that statute. *Ibid.*

PURCHASER. See VENDOR AND PURCHASER.

QUANTUM MERUIT. See PHYSICIANS AND SURGEONS, 3.

QUESTIONS FOR JURY. See AUTOMOBILES, 4, 9. CORPORATIONS, 1. CRIMINAL LAW, 12. DAMAGES, 2. DISORDERLY HOUSE, 3. EVIDENCE, 2. FEDERAL EMPLOYERS' LIABILITY, 13, 14. FRAUD, 3. FRAUDULENT CONVEYANCES, 3. NEGLIGENCE, 4, 5. SALES, 10, 14, 18. STREET RAILWAYS, 4. TRIAL, 6.

RAILROAD COMMISSION. See PUBLIC UTILITIES.

RAILROADS.

See CARRIERS, 2, 3. FEDERAL EMPLOYERS' LIABILITY. STREET RAILWAYS.

Refusal to honor employee's pass: Attempt to ride secretly: Death.

1. An employee of a railroad company having an employee's pass which on its face entitled him to passage on a certain train, but who was refused passage by the conductor on the ground that a bulletin issued later than the pass prohibited the carrying of passengers on employees' passes on such train, had no right to attempt to ride thereon, but should have obeyed the orders of the trainmen and got off, even if he was caused considerable inconvenience. *Herschman v. Chicago, M. & St. P. R. Co.* 209
2. In an action against the railroad company for the death of the employee, run over by the train after he had jumped on the rear steps of a sleeping-car under the trap door of the vestibule when he was refused passage, testimony that the conductor had pushed deceased off the rapidly moving train is *held* incredible and contrary to reasonable probabilities and to the physical facts, in view of other circumstances in evidence. *Ibid.*

RATES. See CARRIERS, 2, 3.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See BOUNDARIES. BROKERS. CONSTITUTIONAL LAW, 2. DIVORCE, 1. DRAINS. EASEMENTS. EMINENT DOMAIN. INSANE PERSONS. MUNICIPAL CORPORATIONS, 1–4. SPECIFIC PERFORMANCE. VENDOR AND PURCHASER. WASTE. WILLS.

RECEIPT. See CONTRACTS, 9, 10.

RELEASE.

Presumption accorded release.

1. In personal injury actions wherein the defense of settlement is interposed, the burden of proving the settlement is on defendant; but when a proper release, duly executed and signed, is introduced, the settlement can only be overcome by

evidence on behalf of the plaintiff which is clear and convincing beyond reasonable controversy. *Hanley v. Hines,* 252

2. Where plaintiff's testimony as to how an accident occurred was opposed to the weight of disinterested testimony and barely credible, and in so far as the legal liability of the defendant company was concerned she had a doubtful case, the evidence (set out in the opinion) is *held* not to overcome the presumption created by a release signed by her, which she could have read, and a check which she cashed containing a provision that it was in full payment of her loss of personal property and in satisfaction of her claim for personal injuries. *Ibid.*

Release of mortgage. See TRUSTS.

REMANDING CASE. See APPEAL, 19.

REPEAL OF STATUTES. See STATUTES, 5, 6.

REPLEVIN. See FRAUDULENT CONVEYANCES, 1.

RESCISSION. See BROKERS, 2.

RESIDUARY LEGATEES. See WILLS.

RES IPSA LOQUITUR. See ELECTRICITY.

RES JUDICATA. See JUDGES, 3.

REVENUE STAMPS. See SALES, 6.

REVERSIONS. See WASTE, 5.

REVIEW. See APPEAL.

RIGHT OF WAY. See EASEMENTS.

ROADS AND STREETS. See AUTOMOBILES. EASEMENTS. HIGHWAYS. MUNICIPAL CORPORATIONS, 1–4. STREET RAILWAYS.

SAFE-PLACE-TO-WORK STATUTES. See FEDERAL EMPLOYERS' LIABILITY, 4. MASTER AND SERVANT.

SALES.

See BROKERS. CONTRACTS, 8. NEW TRIAL, 4, 5.

Contract: Acknowledgment of order: Construction.

1. A written acknowledgment of a verbal order for goods becomes the contract between the parties. *Stark v. Burnham Bros. Brick Co.* 331

2. A contract for the sale of brick to one erecting a building for a packing company and providing for delivery to such packing company contained no implied obligation on the part of the buyers that the brick was to be used solely in work to be done for that company; and the buyers having paid for all brick delivered and tendered payment for the undelivered brick, nondelivery was not justified because they insisted on their right to use the brick on other jobs, sub. 5, sec. 3315, Stats. (providing a penalty for using materials in the construction of any other building or improvement than that for which it was represented they were purchased), being inapplicable, since this was not a sale on credit and the con-

tract did not contain any representation as to where the brick were to be used and the seller did not give written notice to the owner of the building or improvement under sub. 1 of sec. 3315. *Ibid.*

Same: Measure of damages.

3. Under sub. 3, sec. 1684*t*—67, Stats., the measure of damages for the nondelivery of the brick was the difference between the contract price and the market price at the time delivery was demanded, with interest from that date. *Stark v. Burnham Bros. Brick Co.* 331

Breach by seller: Failure to deliver goods: Embargo. See INSPECTION OF INSTRUMENTS, 3.

4. A complaint for breach of contract to sell peas "subject release after embargo within next two weeks," alleging that the embargo was released April 26, 1920, states a cause of action, though it alleged that the contract was made April 10th, where the final confirmation thereof was dated April 12th, and it appeared from the correspondence attached to the complaint that both parties interpreted the contract as expiring on April 26th, since defendant could not, as alleged in the complaint, rely on the provisions of the contract with reference to the embargo as grounds of cancellation. *Quaker Maid Corp. v. New Holstein C. Co.* 279

5. Where the seller proposed to extend the time of performance of the contract on condition that the buyer send a check "to hold until such time when we will be able to get permission to make shipment," a check indorsed "Not to be deposited until shipment of peas has been made as per terms of sale" was non-negotiable and did not comply with the seller's request, so that there was no modification of the contract as to time of performance. *Ibid.*

6. Defendant's claim that it had a right to reject the check of plaintiff because it bore no revenue stamp is immaterial where it does not appear that the check was rejected in fact. *Ibid.*

Remedies of buyer: Taking possession of rejected goods: Reasonable value.

7. Under sec. 1684*t*—49 and sub. 1 (a), sec. 1684*t*—69, Stats., the buyer of goods, having upon delivery telegraphed the seller rejecting the shipment as not of the quality purchased and asking directions as to disposition of the goods, and no answer to the inquiry being made, could, when called upon by the railroad company to unload the car, take possession of the goods and pay only the reasonable market value therefor. *Greenberg v. Perlson,* 84

Breach by buyer: Acceptance without objection: Reasonable time to give notice of defects.

8. Under sec. 1684*t*—47, Stats., entitling a buyer to a reasonable opportunity for ascertaining whether goods sold are in conformity with the contract, and sec. 1684*t*—48, providing that the buyer is deemed to have accepted the goods when, after

the lapse of a reasonable time, he retains them without intimating that he has rejected them, where defects in plush coats purchased by defendant could have been easily discovered without close inspection and were noticed when the coats were unpacked by persons having experience in handling such goods, the absence from the buyer's store of the head of the department, who had more experience in examining goods, was not sufficient excuse for their retention for twenty-five days without objection. *Knobel v. J. Bartel Co.* 393

9. Where the defects were obvious and noticed when the coats were unpacked, but the buyer attached its regular store tags, hung them up in the store, and attempted to remedy the defects by a steaming process, its manner of dealing with the goods was inconsistent with the ownership of the seller within sec. 1684*t*—48, Stats., relative to acceptance. *Ibid.*

10. What is a reasonable time for acceptance of goods by a buyer is usually a question for the jury, but the goods may be retained for so long a time without objection that a court can say as a matter of law that they have been accepted. *Ibid.*

11. In an action for the price of goods sold to a dealer with a counterclaim for defects involving the question whether they were accepted, evidence of a custom in the city where the buyer had its store as to unpacking goods to prevent disfigurement and crushing, and as to the time when the retail trade in such goods commenced, was properly excluded in the absence of evidence or of an offer to show that the seller knew of it or that it was so well established, uniform, and notorious that the parties must be presumed to have known it and to have contracted in reference to it. *Ibid.*

12. Where the defects in the coats were obvious and noticed by the buyer within twenty-four hours after delivery, whether twenty-five days was a reasonable time for the inspection and return of the goods was the ultimate question to be determined by the jury or the court and was not a proper subject for expert testimony. *Ibid.*

13. Under sec. 1684*t*—49, Stats., providing that if, after acceptance of goods, a buyer fails to give notice of the breach of any promise or warranty within a reasonable time after he knew or ought to have known of the breach, the seller will not be liable, the reasonable time within which a buyer was required to make a claim for damages commenced to run when it knew or ought to have known of defects in the goods. *Ibid.*

Warranties: Soundness of horse.

14. The question whether the seller of a horse, expressly or by implication, warranted it to be all right and not spavined, is for the jury. *Hind v. Thomas,* 379

15. Under some circumstances the intentional nondisclosure of a latent defect by a seller may avoid a sale though there is no warranty. *Ibid.*

16. In an action for the purchase price of a horse, where the defense was that the horse was spavined and that plaintiff had represented it to be all right, testimony that the horse, if sound, would have been worth from $220 to $275 in the market was relevant to the question whether defendant relied on any representations made at the time he bought the horse for $147.50. *Ibid.*

Same: That cow is a breeder: Evidence: Notice.

17. A warranty that a cow is a breeder does not amount to a guaranty that the cow will at the end of the full period of gestation produce a live, properly matured calf; and in an action on breach of a warranty of this kind, the fact that the cow aborted on June 16th, ten weeks before the full time, does not relieve the plaintiff buyer from proving that when she was sold on March 16th she was incapable of producing a mature calf. *Tegen v. Chapin,* 410

18. In an action for breach of such a warranty the opinion of one expert that at the time of the sale the cow had contagious abortion, based on a single abortion after she had opportunity to contract the disease during shipment and contact with other cattle subsequent to the sale, is insufficient to take to the jury the question whether she had contagious abortion at the time of the sale. *Ibid.*

19. Where the buyer lived only 130 miles from the seller and there was daily communication between the two places, a delay of fifty-seven days in notifying the seller of a breach of the warranty, after an abortion which the buyer claimed established the breach, was unreasonable under sec. 1684*t*—49, Stats., relieving the seller from liability for breach of warranty unless the buyer gives notice within a reasonable time after he knows or ought to know thereof. *Ibid.*

20. While under said sec. 1684*t*—49, Stats., acceptance of the goods does not waive recovery for breach of warranty, it charges the buyer with the duty of giving notice, and he must, in the absence of circumstances excusing or justifying delay, move with some degree of promptness under all the circumstances. *Ibid.*

Sales of land. See VENDOR AND PURCHASER.

SATISFACTION OF MORTGAGES. See TRUSTS.

SCHOOLS AND SCHOOL DISTRICTS.

See INSANE PERSONS.

Superintendent of city schools: How chosen.

1. Sec. 926—115, Stats. (ch. 360, Laws 1903), providing that in all cities except those of the first class the board of education may elect a superintendent of schools for not exceeding three years, applies to the city of Racine; ch. 388, Laws 1905, amended ch. 360, Laws 1903, relative to the election of a superintendent in cities of the third class, by providing for

their election by the board of education, and that the act shall apply to all such cities in which a superintendent is elected or appointed by the board, and repealed all conflicting acts. If there was any conflict between sec. 926—115 and the general charter law (sec. 925—115), which had been adopted by the city of Racine in 1905, sec. 925—115 is expressly repealed by sec. 926—115. *Sieb v. Racine,* 617

Not an officer: Change in salary.

2. As a matter of public policy, a city superintendent of schools should not be held to be a public officer who, as required by sub. (2), sec. 62.09, Stats. 1921, in the case of city officers, must be a citizen, unless such is plainly the legislative intent; it being a matter of common knowledge that city boards of education frequently deem it for the best interests of the schools to select men for such position who are not residents of the state. *Sieb v. Racine,* 617
3. Under sec. 926—115, Stats., such an appointee is not an officer, as the statute prescribes no definite term, does not require an oath, and confers no functions of sovereignty unless it be in licensing teachers, all of which are usual, if not indispensable, characteristics of an office. *Ibid.*
4. In analogy to the rule that the salary of a public officer may be raised or diminished during his term unless forbidden by law, a city board of education may abrogate contracts with the city superintendent of schools and enter into new contracts for increased compensation; the public policy declared in sec. 26, art. IV, Const. (prohibiting the legislature from granting extra compensation to any public officer, agent, servant, or contractor after the services have been rendered or the contract entered into), being applicable only to public officers and contractors who are paid out of the state treasury, and by sec. 59.15 and sub. (6) (b), sec. 62.09, Stats. 1921, to county and city officers but not to contractors. *Ibid.*

SEARCH AND SEIZURE. See INTOXICATING LIQUORS.

SERVANT. See MASTER AND SERVANT.

SERVICE OF PROCESS. See APPEAL, 4. CORPORATIONS, 6–9.

SETTLEMENT. See COMPROMISE AND SETTLEMENT. JUDGMENT, 4–6. RELEASE. WILLS, 7.

SHERIFFS.

Term: Until successor qualifies: Eligibility to office for succeeding term.

1. A sheriff, whether elected or appointed, holds his office until his successor is elected and qualified. *State ex rel. Pluntz v. Johnson,* 107
2. Under sec. 4, art. VI, Const., providing that sheriffs shall be ineligible for two years next succeeding the termination of their offices, the period of ineligibility is the term succeeding that for which the sheriff was elected. *Ibid.*

3. Thus, where J. was appointed to the office of sheriff during 1917 for the unexpired portion of the term ending January, 1919, and under such appointment held the office until July, 1920, it is *held* that J. was not ineligible to election for the term beginning in January, 1921, even though he held such office nearly four out of four and a half years. *Ibid.*

SPECIAL VERDICT. See APPEAL, 7. CONTRACTS, 11. CORPORATIONS, 1. NEW TRIAL, 7. STREET RAILWAYS, 1, 5, 6. TRIAL, 7–11.

SPECIFIC PERFORMANCE.

See ACTION. VENDOR AND PURCHASER.

Where time is of essence of contract.

1. Where time is not of the essence of a contract and the thing to be done can be as well done at a later as at an earlier day without detriment to the party for whom it is to be done, the delay will not prevent specific performance. *Hermansen v. Slatter,* 426

2. In equity the modern tendency is not to hold time as of the essence of a contract; but if the contract, with the surrounding facts and circumstances, shows that the parties intended time to be of the essence, full effect will be given to the intention, although there is no clause in the contract declaring it so. *Ibid.*

3. If either party unreasonably delays in complying with the terms of the agreement the other may assign a reasonable time within which performance shall be made. The time thus allotted becomes essential, and if performance is not made before it elapses equity will not aid the defaulting party in enforcing the contract. *Ibid.*

4. The evidence (stated in the opinion) as to the surrounding circumstances and conduct of the parties is *held* to present a question for the trial court as to whether it was the intention of the parties that a contract for a conveyance of land on a fixed date made time as of the essence. *Ibid.*

Failure of vendor's title: Remedies of vendee.

5. Though the title of a vendor of land was defective, if he had acted with reasonable promptness to perfect it, or if delay in perfecting it was waived, specific performance might be compelled even though title was not perfected until the time of the trial. *Hermansen v. Slatter,* 426

6. In an action for specific performance, the evidence is *held* not to justify disturbing findings of the trial court that the vendee did not waive the delay of the vendor in perfecting title, or estop himself to object. *Ibid.*

7. In an action for specific performance, entire failure of title is not in all cases a complete defense to the action, but the

court may retain jurisdiction and give damages as compensation. *McFarlane v. Dixon,* 652

8. Where there is a failure of title as to a portion of the land, the court may require the vendor to give the best title he can and order an amount abated from the purchase price for the deficiency of title or quantity or quality of the estate. *Ibid.*

Stipulation as to liquidated damages as affecting specific performance.

9. A contract for an exchange of lands which provided that in case either party should fail, refuse, or neglect to perform he should forfeit and pay to the other $500 as liquidated damages, is construed to mean that each party reserved the right to withdraw from the contract upon payment of such sum, and specific performance will not be decreed. *Dekowski v. Stachura,* 154

STATES. See INTOXICATING LIQUORS, 2. JUDGES.

STATUTE OF LIMITATIONS. See MUNICIPAL CORPORATIONS, 1, 4.

STATUTES.

See AUTOMOBILES, 14. CONSTITUTIONAL LAW.

Constitutionality. See CONSTITUTIONAL LAW. MUNICIPAL CORPORATIONS, 6, 9.

Construction. See ACTION. APPEAL, 2, 3, 6, 17. AUTOMOBILES, 10, 13, 14. CRIMINAL LAW, 1, 10, 13, 14. DRAINS, 1–4, 9, 12. EXECUTION, 1. GUARDIAN AND WARD. HIGHWAYS, 2. HOMICIDE, 3, 7, 8. INDICTMENT, 2, 3. INSPECTION OF INSTRUMENTS, 1, 3, 4. INSURANCE, 1. INTOXICATING LIQUORS. JUDGES, 1, 2. JUDGMENT, 4, 6. LOST INSTRUMENTS. MUNICIPAL CORPORATIONS. NEW TRIAL, 6, 7. OFFICERS, 2. PUBLIC UTILITIES. SALES, 2, 3, 7–9, 13, 19, 20. SCHOOLS. VENUE, 1–3. WILLS, 1, 2, 6, 8. WORKMEN'S COMPENSATION, 1, 4.

1. The fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. *State ex rel. Time Ins. Co. v. Superior Court,* 269

2. The general rule is that the spirit or reason of the law will prevail over the letter; and to ascertain the object the legislature had in mind in the amendment of a statute it is proper to consider the occasion and necessity thereof, the defects and evils in the former law and the remedy provided by the new one, and construe it in such a way as is best calculated to suppress the mischief and secure the benefits intended. *Ibid.*

3. Statutes *in pari materia* must be construed together, and recourse must also be had to the object of the legislature and the rights obviously sought to be safeguarded. *State ex rel. Plowman v. Lear,* 406

4. Statutes creating new rights are not construed as applying to past wrongs unless plainly so intended, and in case of doubt or ambiguity they are construed as prospective only. *Becker v. Green County,* 120

Same: Revisions and amendments.

5. Even if by amendment a statute had been repealed, and re-enacted in the same words, by an act which took effect at the same time as the repealing act, the portion of the statute re-enacted would continue such former statute in uninterrupted operation, and there would be no change in the law. *State ex rel. Time Ins. Co. v. Superior Court,* 269

6. A revision of the statutes is more than a restatement of the substance thereof in different language, and implies their re-examination and may constitute a restatement of the law in a corrected or improved form, in which case the revision may be with or without material change, and is substituted for and displaces and repeals the former law as it stood relating to the subjects within its purview. *Becker v. Green County,* 120

Same: "Or" and "and" in statute.

7. The words "or" and "and" in statutes are often used incorrectly; and where a strict reading renders the sense dubious, one may be read in place of the other, in deference to the meaning of the context. *State ex rel. Wis. D. M. Co. v. Circuit Court,* 198

Repeal of statutes. See SCHOOLS, 1.

STIPULATED DAMAGES. See DAMAGES, 1. SPECIFIC PERFORMANCE, 9.

STOCKHOLDERS. See CORPORATIONS.

STREET RAILWAYS.

See AUTOMOBILES, 12.

Injuries to passengers: Passenger boarding car.

1. Plaintiff attempted to board a street car operated by the defendant street railway company, but before he was in the vestibule the car started and carried him against a truck owned by the other defendant which was parked close to the track. Judgment was rendered on a special verdict in plaintiff's favor against the defendant railway company and the record is not clear whether judgment was entered dismissing the other defendant. *Held,* that the rights of the defendant street railway company against its codefendant are not affected by whatever disposition was made of plaintiff's cause of action against such defendant, and on its appeal from the judgment in plaintiff's favor it cannot raise the question. *Kausch v. Chicago & M. E. R. Co.* 21

2. The conductor of the street car, being chargeable with knowledge that plaintiff was not safely aboard the car, should have anticipated that some injury might probably result to him from the sudden starting of the car while he was in the act

of boarding it; and legal negligence on the part of the company is sufficiently established though the conductor did not know of the presence of the truck near the track. *Ibid.*

3. The presence near the street railway track of the truck, even if it constituted negligence on the part of the owner, was not an intervening cause of the injury but a concurring cause. *Ibid.*

Collisions with automobiles: Negligence.

4. In an action to recover damages for injury to plaintiff's automobile, evidence showing that plaintiff was traveling lengthwise on a street railway track; that a belated street car, with dim headlights, was proceeding at an excessive rate of speed on its last trip to the car barn; that plaintiff stopped suddenly at the signal of a traffic officer and, looking backward, saw the approaching car and attempted to turn from the tracks; and that the street car, which had sounded no signal, came on with undiminished speed and struck the automobile, is *held* to make plaintiff's contributory negligence a jury question. *Kornwolf v. Milwaukee E. R. & L. Co.* 160

5. The refusal of the trial court to submit in the special verdict the question whether plaintiff exercised ordinary care in allowing his automobile to be on the track at the time and place of the collision was not error, every phase of contributory negligence having been covered by instructions with respect to another question submitted. *Ibid.*

Same: Accidents at grade crossings.

6. The deceased had driven his automobile onto the track of the defendant interurban railway at a country grade crossing, where for some unexplained reason the automobile stopped and an approaching interurban car struck it. The evidence as to the period of time that the automobile remained stationary on the track being in conflict, it is *held* that a special verdict to the effect that the deceased was not negligent and that the motorman could not have seen the automobile on the track in time to have avoided a collision was not inconsistent, as the questions were for the jury, which was not bound to accept the statements of plaintiff's witnesses as to the time the car was stalled, and there was no evidence that the motorman was guilty of gross negligence. *Sharp v. Milwaukee E. R. & L. Co.* 340

STREETS. See ROADS AND STREETS.

SUBROGATION. See TRUSTS, 1.

SUPERINTENDENT OF SCHOOLS. See SCHOOLS.

SUPREME COURT. See APPEAL.

SURGEONS. See PHYSICIANS AND SURGEONS.

SURVEYS. See BOUNDARIES.

SURVIVAL OF ACTION. See WASTE, 1. WORKMEN'S COMPENSATION, 4, 5.

TAXPAYER'S ACTION. See MUNICIPAL CORPORATIONS, 11–13.

TIME. See SPECIFIC PERFORMANCE, 1–4.

TITLE.
To land. See BOUNDARIES. CONTRACTS, 8. COURTS, 1. DEEDS. DRAINS, 5, 6. EASEMENTS. FIXTURES. PHYSICIANS AND SURGEONS, 1, 2. WASTE, 2, 4, 5.
To personal property. See BANKRUPTCY. CARRIERS, 3. COURTS, 1. EXECUTORS. GUARDIAN AND WARD, 2. HUSBAND AND WIFE, 1–4. INTOXICATING LIQUORS, 2, 3. JUDGMENT, 9. LOST INSTRUMENTS. PRINCIPAL AND AGENT, 2. SALES. TROVER. WORKMEN'S COMPENSATION, 4.
TORTS. See ACTION. ASSAULT. AUTOMOBILES. BANKRUPTCY. CORPORATIONS, 3. DAMAGES, 3–7. DEEDS, 1. ELECTRICITY. EXECUTION. FEDERAL EMPLOYERS' LIABILITY. FRAUD. FRAUDULENT CONVEYANCES. NEGLIGENCE. PHYSICIANS AND SURGEONS, 1, 2. PLEADING, 3. PRINCIPAL AND AGENT. RAILROADS. STREET RAILWAYS. TRIAL, 6. TROVER. TRUSTS, 1. WORKMEN'S COMPENSATION.
TOWNS. See DRAINS, 9, 10. HIGHWAYS, 2.
TRESPASS. See TRIAL, 6.

TRIAL.

See ARBITRATION AND AWARD. BANKRUPTCY. COURTS.

Excusing defaults: Discretion of court.

1. The discretion vested in trial courts to excuse defaults should be exercised only where good and adequate cause is shown by the affidavits of persons having personal knowledge of the facts. *Ward v. Racine College,* 168

Law of the case. See APPEAL, 13, 14, 16.

Qualifications of juror. See JURY.

View: Erroneous but non-prejudicial instruction.

2. In an action for injuries from a collision between two automobiles at a street intersection, an instruction that the jury had been taken out to view the scene of the accident because in the court's opinion such view was necessary to a just decision, and that if any witness testified to anything the jury knew, by the evidence of their senses, was false, they might disregard his testimony, though no other witness testified to the fact as they knew it to be, was erroneous but not prejudicial, where, so far as applicable to any evidence, it may have been more favorable to defendant than to plaintiff. *Heintz v. Schenck,* 562

Evidence: Admissions in pleading.

3. Admissions contained in the pleadings of the opposite party may be read to the jury in the argument of counsel without having been specially offered and admitted in evidence. *Nelson v. Pauli,* 1

4. The defendant was not prejudiced by the refusal of the court to permit an allegation in plaintiff's complaint, that it was dark at the time of the accident, to be read to the jury on the ground that it constituted an admission that it was dark at

such time, the word "dark" being a relative term and not necessarily meaning the entire absence of all light or ability to see things. *Ibid.*

Cross-examination of witnesses. See FRAUDULENT CONVEYANCES, 4.

Argument of counsel. See HOMICIDE, 6.

5. In an action for injuries sustained in a collision between two automobiles, remarks by both counsel in reference to an insurance company were not prejudicial, where the talk about such company seems to have originated with defendant's counsel, and it was not clear whether he was trying to tell the jury that plaintiff had indemnity insurance or whether plaintiff's counsel was trying to bring out the fact that defendant's counsel represented an insurance company; and the error, if any, was cured by the court's prompt direction that the jury disregard the remarks. *Heintz v. Schenck,* 562

Question for jury: Answer by court.

6. One cannot complain that the court erred in assessing damages against him for trespass on the ground that the question was for the jury, where the damages allowed were the minimum amount disclosed by the evidence. *Pionke v. Washburn,* 417

Instructions to jury. See DAMAGES, 7. DISORDERLY HOUSE, 8. HOMICIDE, 8. INTOXICATING LIQUORS, 3. NEGLIGENCE, 2, 3. STREET RAILWAYS, 5.

Special verdict: Burden of proof: Form: Immaterial issues. See APPEAL, 7. CONTRACTS, 11. CORPORATIONS, 1. NEW TRIAL, 7. STREET RAILWAYS, 1, 5, 6.

7. An instruction as to the burden of proof was unnecessary where the special questions to the jury were so framed that the burden of proof was on the affirmative side in each instance, and the jury were told with reference to each question that, before they could return an affirmative answer, they must be satisfied to a reasonable certainty, by a consideration of all the evidence, that the fact inquired about existed. *Kausch v. Chicago & M. E. R. Co.* 21

8. Refusal to submit to the jury special questions which are immaterial is proper, as is also a refusal to submit a question covering an element included in a question which was submitted. *Ibid.*

9. The form of the special question to the jury, "Did plaintiff . . . fail to use ordinary care for his own safety and thereby proximately contribute to produce his injury," without any further indication that a slight want of ordinary care by plaintiff proximately contributing to produce the injury would require an affirmative answer, is sufficient and proper. *Ibid.*

10. Where the vital questions involved in an action were the negligence of the defendant, proximate cause, and contributory negligence, it was not prejudicial error to refuse to submit to the jury, as a part of the special verdict, the question "Was plaintiff's injury due to an unavoidable accident?" *Nelson v. Pauli,* 1

11. In answering questions submitted to them it is no part of the function of the jury to determine what effect their answers will have upon the final outcome of the trial; but misconduct of plaintiff's attorney in informing the jury that if they answered "Yes" to a question as to whether plaintiff was guilty of contributory negligence he would have no claim against the defendant was not prejudicial, where the court fully sustained objections of defendant's counsel thereto and fully admonished the jury, plaintiff's case possessing unusual strength and merit upon the question of contributory negligence. *Ibid.*

Damages. See DAMAGES.

Judgment. See JUDGMENT.

New trial. See NEW TRIAL.

Trials in criminal cases. See CRIMINAL LAW.

TROVER AND CONVERSION.

See ACTION. CORPORATIONS, 3.

Money as subject of conversion: Good faith.

1. In this state money is a subject of conversion. *Regas v. Helios,* 56
2. That one charged with conversion acted in good faith is no defense, wrongful intent not being an essential element of conversion. *Ibid.*

TRUSTS.

See BANKRUPTCY. DIVORCE, 4. EXECUTORS, 7. WILLS, 5, 6.

Constructive trust: Money obtained by fraud.

1. G., an owner of a piece of land subject to a first mortgage of $2,000 owned by P. and a second mortgage of $800 to L. G., forged releases of said mortgages and executed four successive mortgages to different persons, each prior mortgage being satisfied by a forged instrument, and the property being inadequate security for the total debt. G. then executed a mortgage on another piece of land to M., falsely representing that it was a first mortgage, whereas prior mortgages had been released by forged satisfactions, and paid the greater portion of the proceeds of the loan from M. to the attorney for P. in satisfaction of his mortgage and interest, but did not secure a written release of P.'s mortgage. *Held,* on the theory of subrogation, that M. was not entitled to the rights of P. under his mortgage, as M. was not to receive a lien on the land covered by P.'s mortgage and there was no agreement between M. and G. as to the application of the money loaned. *Whalen v. Schumacher,* 441
2. G., however, thereby became a constructive trustee for the lender, who was entitled to have the mortgage so paid revived and constitute an existing obligation against G. for the benefit of the lender. *Ibid.*

3. One from whom money has been obtained by fraud may follow and reclaim it or have a trust imposed upon the property into which it has gone, so long as it can be distinctly traced and identified, and provided that no injustice is done to one who stands in the position of a purchaser for value without notice. *Ibid.*

UNDUE INFLUENCE. See HUSBAND AND WIFE, 4.

UTILITIES. See PUBLIC UTILITIES.

VACATION.
Of judgment. See JUDGMENT, 3–5.
Of office. See OFFICERS, 2.
Of street. See MUNICIPAL CORPORATIONS, 1–4.

VENDOR AND PURCHASER.

See CONTRACTS, 8. DRAINS, 5. SPECIFIC PERFORMANCE.

Contract of sale: Sufficiency of evidence.

1. Statements and admissions of the defendant indicating a willingness to convey a tract of land to his son (since deceased), unaccompanied by proof that the son went into possession of the land under any contract or that he ever assented to any terms suggested by the father, are *held* insufficient to establish a binding contract between them. *Weinzirl v. Weinzirl,* 420

Designation of lot by vendor: Mistake: Good faith: Damages.

2. When a vendor undertakes to point out to a purchaser a lot he is selling he is bound to do so correctly; and when the purchaser is ignorant of its location he has the right to rely on the positive statement of the vendor and to hold him responsible whether the false representation was intended or not. *Lee v. Bielefeld,* 225
3. The liability of the vendor does not depend on his negligence or intent, the injury to the vendee being the same whether the false representation is made in good faith or recklessly with intent to defraud; and in this case it is *held* that under the circumstances the vendee was not negligent in failing to have a survey of the lot made. *Ibid.*
4. The usual measure of damages in cases of false representation as to the identity of land sold is the difference between the value of the land pointed out and that of the land conveyed; but such rule does not apply as against a vendor who pointed out a lot which he did not own and upon which the plaintiff vendee, assuming that he had purchased it, constructed improvements, which he was not permitted to remove; and the vendee was entitled to such damages as were the natural and proximate result of the misrepresentations of the vendor. *Ibid.*

Failure of title: Remedies of purchaser.

5. Where vendors who had agreed to convey two lots could not, for failure of title, convey one of them, the purchaser was entitled to rescind the contract. *McFarlane v. Dixon,* 652

6. One who makes a valid contract to sell land is bound to know whether he has title, and is answerable in damages if he is unable to fulfil the contract, his liability not necessarily depending on fraud or bad faith. *Ibid.*

7. If a vendor agrees to convey land he knows he does not own, or if after making the contract he sells to another or otherwise disqualifies himself to make good his original agreement, he is liable for full compensatory damages, including those for the loss of the bargain. *Ibid.*

VENUE.

See APPEAL, 5, 6, 17. CORPORATIONS, 4, 5.

Actions against insurance company.

1. The right of an insurance agent, under sec. 2619, Stats., to bring an action against his principal, the insurance company, for the wrongful termination of the agency, in the county where the cause of action arose, was not affected by the amendment of that section by ch. 334, Laws 1919, interpolating a new subdivision 5, as to actions against a domestic insurance company "to recover on a policy of insurance." *State ex rel. Time Ins. Co. v. Superior Court,* 269

Actions against foreign corporations.

2. Sub. 6, sec. 2619, Stats., placing the venue of actions against "any other corporation existing under the law of this state" in the county in which it is situated or has its principal office or place of business, or in which the cause of action or some part thereof arose, includes foreign corporations. *State ex rel. Wis. D. M. Co. v. Circuit Court,* 198

3. Under said sub. 6 the proper place of trial of an action against a foreign manufacturing corporation is the county where it has its principal office or in which the cause of action or some part thereof arose, although it has its factory or the greater part of its property in another county. *Ibid.*

Sufficiency of motion papers.

4. Where defendant was entitled to remove the cause for trial only to the county designated in his demand, it cannot be said that the motion papers were insufficient because they failed to demand that the trial be had within the "proper county," as required by statute. *State ex rel. Wis. D. M. Co. v. Circuit Court,* 198

VIEW. See TRIAL, 2.

WAIVER.

Of breach of warranty. See SALES, 20.

Of compensation. See CORPORATIONS, 1, 2.

Of delay. See SPECIFIC PERFORMANCE, 5, 6.

Of objection. See CONSTITUTIONAL LAW. HIGHWAYS, 1. JUDGMENT, 5.

Of remedy. See DRAINS, 11.

WARD. See GUARDIAN AND WARD.

WARRANTIES. See SALES, 14–20.

WASTE.

Survival of action: Treble damages: Seizure.

1. Under sec. 4253, Stats., providing that actions for damages to real or personal estate shall survive the death of the wrongdoer, an action for waste, in so far as actual as distinguished from double damages is sought, survives against the estate of a deceased life tenant. *Payne v. Meisser,* 432
2. To maintain an action for waste it is not necessary that one who had a reversionary interest in the land should be seized of such interest at the time the action was brought, it being sufficient if he was seized thereof when the waste was committed. *Ibid.*

Jurisdiction of circuit court: Parties.

3. Sec. 3252, Stats., authorizing the bringing of actions for wrongs done to property, rights, or interests against the executors or administrators of the wrongdoer, and sec. 3170, giving the circuit court jurisdiction of actions for waste, confer jurisdiction on the circuit court in such an action whether or not the plaintiff has filed a claim against the estate in the county court in accordance with secs. 3838, 3840, 3843, and 3844. *Payne v. Meisser,* 432
4. Waste, either permissive or commissive, is an action sounding in tort, and purely tort actions against a deceased person should be prosecuted against his personal representatives in the circuit court or in such other court of civil jurisdiction as the legislature might designate. [It is not held in this case that where a tort may be waived a claim cannot be filed in the county court on implied contract.] *Ibid.*
5. Under sec. 2604, Stats., a reversioner who refuses to join as a party plaintiff in an action against the executor of the life tenant for waste committed by deceased is a proper party defendant. *Ibid.*

WATERWORKS. See PUBLIC UTILITIES.

WIDOWS. See HUSBAND AND WIFE, 1, 2. WORKMEN'S COMPENSATION, 2, 4.

WILLS.

See EXECUTORS. GUARDIAN AND WARD, 2.

Construction: Property "in expectancy."

1. A will which, after making specific devises and bequests, contained a gift of the residue of the property of the testatrix, real, personal, or mixed, "in possession or expectancy," there being nothing in the will restricting the term "expectancy" to personal property, manifested an intention to dispose of after-acquired real estate within the provisions of sec. 2279, Stats. *Will of Smith,* 494

Same: Estates conveyed.

2. Where the will gave the residuary estate to the children of the testatrix and provided that if any of the children died without issue or left no husband or wife his share should go to the

surviving children; that if all should die without issue or husband or wife surviving the whole residue and remainder should go to third persons; and that if any child died before or after the death of testatrix leaving issue such issue should take the parent's share absolutely, the children of testatrix took only a life estate. *Will of Smith,* 494

3. Directions in the will as to the disposition of the share of any deceased child always referring to such share and not to any remaining portion thereof, and there being no declaration that the children shall have any right to such share absolutely, the will is construed to show no intention to give the children as life tenants any right to consume for their own purposes any of the principal of their respective shares. *Ibid.*

4. Under such a will the surviving husband or wife of any child dying without issue is entitled absolutely to the share of such deceased child, though there is no express provision to that effect. *Ibid.*

Same: Appointment of trustee: Conversion of real estate into personalty.

5. Under the circumstances of this case it was the duty of the court to declare a trust created and appoint a trustee, though there was nothing in the will expressly indicating that the testatrix intended to create a trust, or directing how it should be carried out, or providing for the conversion of real estate into personal property. *Will of Smith,* 494

6. The will, construed as requiring the court to declare a trust created, does not violate sec. 2041, Stats., relative to successive life estates, where a substantial part of the property was personal property, since to effectually carry out the purpose of the testatrix the real estate should be converted into personalty and the entire estate administered as such, particularly where the great bulk of the estate was personal property and a considerable portion of the real estate was unimproved. *Ibid.*

Right of residuary legatees to cancel settlement secured through fraud: Spurious heirs.

7. Residuary legatees were not barred by laches from seeking a cancellation of proceedings in which they had made a settlement with a child claimed by the surviving widow of testator's son to be his issue, on her subsequent confession that such child was not the son's issue, though the residuary legatees had suspected fraud, where the evidence was insufficient to warrant any reasonable expectation of success in establishing fraud. *Guardianship of Reeve,* 579

8. Such residuary legatees were not barred by the statute of limitations where the fraud perpetrated was not discovered until one year prior to the commencement of the action, even though they had previously suspected the fraud. This action, being to clear the records of the probate court, is one in which relief could be sought only in chancery, and under sub. (7), sec. 4222, Stats., does not accrue until discovery of the fraud. *Ibid.*

9. On discovery by the county court that the child whom the surviving wife had fraudulently claimed to be the issue of her deceased husband, and for whom the court had appointed a guardian, was not in fact the husband's child, it was proper for the court to cancel proceedings in which the guardian had received a certain sum for releasing the child's claim as the issue of the husband to certain property, and to order the guardian to refund the amount so received to the persons who paid it. *Ibid.*

WITNESSES. See FRAUD, 8. FRAUDULENT CONVEYANCES, 4. STREET RAILWAYS, 6. TRIAL, 2.

WORDS AND PHRASES.
And, in statute. See STATUTES, 7.
Culpable negligence, in statute. See HOMICIDE, 7.
Dark, in pleading. See TRIAL, 4.
Dependent daughter, in statute. See MUNICIPAL CORPORATIONS, 8.
Exist. See page 202.
Expectancy, in will. See WILLS, 1.
Final judgment, in statute. See JUDGMENT, 4.
Gross negligence. See page 299.
Heretofore, in statute. See PUBLIC UTILITIES, 1.
Infamous crime, in constitution and statute. See OFFICERS, 2.
Intoxicating liquors. See INDICTMENT, 3.
Involuntary, in statute. See HOMICIDE, 7.
Judicial dictum. See page 237.
Obiter dictum. See page 237.
Or, in statute. See STATUTES, 7.
Ordinary negligence. See page 299.
Owner, in statute. See DRAINS, 5.
Regular municipal election, in statute. See MUNICIPAL CORPORATIONS, 7.
Waiver. See page 329.

WORKMEN'S COMPENSATION.

Application for compensation as assignment of claim against third person.

1. An application for workmen's compensation by an employee operates, under sec. 2394—25, Stats., as an assignment of any cause of action that the employee may have against a third person; and when compensation is paid to the dependents of the employee, the cause of action existing by virtue of the statutes (sec. 4255) in favor of the personal representatives of the employee to recover damages for the death of such employee is assigned to the employer. *Anderson v. Miller Scrap Iron Co.* 521

Same: Application by widow: Laws of sister state.

2. An application by a widow of the employee for compensation does not operate as an assignment of a cause of action existing by virtue of the statutes of a sister state in favor of the personal representatives of an employee, as the widow does not own such cause of action, and neither the legislature nor

the courts of one state have power to interfere with a cause of action created by the laws of a sister state. *Anderson v. Miller Scrap Iron Co.* 521

3. Where the accident causing death occurred in another state, the rights and liabilities of the parties are fixed by the laws of such state. *Ibid.*

4. Where an employee who died as the result of an accident occurring in the state of Michigan did not make claim for workmen's compensation during his lifetime or assign the cause of action, the payment of compensation on the application of the surviving widow did not operate as an assignment of the cause of action, sec. 14578 of the Compiled Laws of Michigan of 1915 vesting the cause of action in such employee and after his death in his personal representatives. *Ibid.*

[5. The assumption that this action was based on the death statute of Michigan, whereas it is based on the survival act of that state, does not affect the conclusion of the original opinion.] *Ibid.*

WRITS.
Of *certiorari.* See DRAINS, 12.
Of error. See CRIMINAL LAW, 8.
Of *habeas corpus.* See CRIMINAL LAW, 7, 8.
Of *mandamus.* See MANDAMUS.

E.P.P.
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